

11-15-2012

Guzman v. Piercy Clerk's Record v. 6 Dckt. 39708

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(VOLUME 6)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

LAW CLERK

LUIS JESUS GUZMAN, individually,

**Plaintiff-Defendant-
Respondent-Cross Appellant,**

-vs-

DALE PIERCY, individually,

**Defendant-Plaintiff-
Appellant-Cross Respondent,**

-vs-

CANYON COUNTY,

Defendant-Respondent,

And

JENNIFER L. SUTTON, individually,

**Defendant-Respondent-
Cross Appellant.**

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

Honorable BRADLY S. FORD, District Judge

Rodney R. Saetrum and Ryan B. Peck
SAETRUM LAW OFFICES

Attorneys for Appellant

Joshua S. Evett and Meghan Sullivan Conrad
ELAM & BURKE, PA.

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Attorneys for Respondents (Sutton and Guzman)

Carlton R. Ericson

Canyon County Deputy Prosecutor

Attorney for Respondent (Canyon County)

39708

IN THE SUPREME COURT OF THE
STATE OF IDAHO

LUIS JESUS GUZMAN, individually,)
)
 Plaintiff-Defendant-Respondent-)
 Cross Appellant,)
)
 -vs-)
)
 DALE PIERCY, individually,)
)
 Defendant-Plaintiff-Appellant-)
 Cross Respondent,)
)
 -vs-)
)
 CANYON COUNTY,)
)
 Defendant-Respondent,)
 And)
)
 JENNIFER L. SUTTON, individually,)
)
 Defendant-Respondent-)
 Cross Appellant.)

Supreme Court No. 39708-2012

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE BRADLY S. FORD, Presiding

Rodney R. Saetrum and Ryan B. Peck, SAETRUM LAW OFFICES,
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TABLE OF CONTENTS

	Page No.	Vol. No.
Register of Actions	1 – 19	1
Complaint and Demand for Jury Trial, filed 5-10-05	20 – 22	1
Amended Complaint and Demand for Jury Trial, filed 5-19-05	23 – 25	1
Answer and Demand for Jury Trial, filed 6-20-05	26 – 31	1
Second Amended Complaint and Demand for Jury Trial, filed 8-30-05	32 – 35	1
Answer to Plaintiffs' Second Amended Complaint and Demand For Jury Trial, filed 9-15-05	36 – 41	1
Answer to Complaint and Demand for Jury Trial, filed 10-11-05	42 – 45	1
Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-2-07	46 – 74	1
Affidavit of Ryan B. Peck, filed 5-2-07	75 – 85	1
Affidavit of Michael A. Pope, filed 5-2-07	86 – 113	1
Defendant Piercy's Motion for Summary Judgment, filed 5-2-07	114 – 115	1
Affidavit of Jerry Deal, filed 5-16-07	116 – 118	1
Affidavit of Dennis Sorrell, filed 5-16-07	119 – 121	1
Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-16-07	122 – 125	1
Affidavit of Dale Piercy, filed 5-17-07	126 – 128	1
Third Amended Complaint and Demand for Jury Trial, Filed 6-6-07	129 – 133	1
Affidavit of Glenn Koch, filed 7-9-07	134 – 136	1
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-9-07	137 – 145	1
Affidavit of Linda Hansen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	146 – 156	1

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of Don Allen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	157 – 168	1
Affidavit of Bill A. Staker in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	169 – 171	1
Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	172 – 174	1
Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	175 – 177	1
Affidavit of Rosemary Thomas in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	178 – 182	1
Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	183 – 211	2
Affidavit of Timothy C. Walton in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	212 – 271	2
Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment, filed 7-24-07	272 – 290	2
Affidavit of Jennifer Sutton, filed 7-24-07	291 – 293	2
Affidavit of Dawn McClure, filed 7-31-07	294 – 306	2
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-31-07	307 – 329	2
Second Affidavit of Dale Piercy, filed 7-31-07	330 – 332	2
Second Affidavit of Ryan B. Peck, filed 7-31-07	333 – 344	2
Amended Notice of Hearing, filed 8-2-07	345 – 346	2
Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	347 – 354	2
Third Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	355 – 357	2
Defendant Sutton's Answer to Third Amended Complaint and Demand for Jury Trial, filed 8-13-07	358 – 362	2

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Answer to Plaintiffs' Third Amended Complaint and Demand For Jury Trial, filed 8-17-07	363 – 368	2
Memorandum in Support of Defendant Piercy's Motion to Strike, filed 8-23-07	369 – 378	2
Plaintiffs' Motion to Strike and Notice of Hearing, filed 8-24-07	379 – 381	3
Affidavit of Deborah Schrecongost in Support of Plaintiffs' Motion to Strike, file 8-24-07	382 – 393	3
Defendant Sutton's Supplemental Brief in Opposition to New Arguments and Facts Raised by Piercy, filed 8-28-07	394 – 404	3
Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment, filed 8-28-07	405 – 417	3
Reply to Plaintiffs' and Co-Defendant's Responding Memorandums and Motion to Strike Co-Defendant's Supplemental Brief, filed 8-30-07	418 – 444	3
Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved, filed 10-9-07	445 – 469	3
Action for Declaratory Judgment, filed 10-15-07	470 – 502	3
Notice of Hearing on Plaintiffs' Motion to Reconsider, Filed 11-8-07	503 – 504	3
Plaintiffs' Memorandum in Support of Motion to Reconsider, Filed 11-8-07	505 – 523	3
Answer to Third Party Defendant Canyon County, Idaho, Filed 11-8-07	524 – 529	3
Defendant Jennifer Sutton's Response and Joinder in Plaintiffs' Motion to Reconsider, filed 11-27-07	530 – 539	3
Defendant Piercy's Objection to Plaintiffs' Motion to Reconsider, filed 12-3-07	540 – 548	3
Order for Dismissal with Prejudice, filed 2-12-08	549	3

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Order for Dismissal with Prejudice of Claims by Erika Rivera Only, filed 2-19-08	550 – 551	3
Order from Scheduling Conference Setting Bench Trial on Challenge to Canyon County Herd Districts, filed 3-27-08	552 – 556	3
Plaintiff's Motion to Reconsider, filed 3-27-08	557 – 559	3
Response to Plaintiff's Motion for a Ruling on Plaintiff's Motion To Reconsider, filed 3-28-08	560 – 562	3
Order on Plaintiff's Motion to Reconsider, filed 4-3-08	563 – 565	3
Plaintiff's Supplemental Memorandum in Support of Motion For Reconsideration, filed 4-21-08	566 – 571	3
Order on Motion to Reconsider, filed 4-30-08	572 – 592	4
Order of Clarification, filed 8-1-08	593 – 595	4
Plaintiff's Memorandum in Opposition to Piercy's Motion to Reconsider, filed 8-27-08	596 – 598	4
Third Party Defendant Canyon County's Pretrial Statement, Filed 8-27-08	599 – 602	4
Pretrial Memorandum, filed 8-27-08	603 – 611	4
Plaintiff's Pretrial Conference Statement, filed 8-28-08	612 – 644	4
Third Party Defendant Canyon County's First Amended Pretrial Statement, filed 8-29-08	645 – 647	4
Defendant Jennifer Sutton's Pretrial Memorandum, Filed 9-2-08	648 – 661	4
Stipulation to Amend Pleadings and Scheduling, filed 9-4-08	662 – 670	4
Order to Amend Pleadings and Scheduling, filed 9-5-08	671 – 677	4
Amended Action for Declaratory Relief, filed 9-11-08	678 – 699	4
Plaintiff Luis Guzman's Answer to Amended Action for Declaratory Relief, filed 9-19-08	700 – 704	4

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Order Denying Defendant Piercy's Motion to Reconsider, Filed 9-23-08	705 – 714	4
Third Party Defendant Jennifer Sutton's Answer to Amended Action for Declaratory Relief, filed 9-23-08	715 – 720	4
Supplemental Pretrial Memorandum, filed 9-23-08	721 – 722	4
Third Party Defendant Canyon County's Answer to Plaintiff Piercy's Amended Action for Declaratory Relief, filed 9-24-08	723 – 728	4
Third Party Defendant Canyon County's Third Amended Pretrial Statement, filed 10-3-08	729 – 732	4
Third Party Defendant Canyon County's Fourth Amended Pretrial Statement, filed 10-6-08	733 – 736	4
Third Party Defendant Canyon County's Fifth Amended Pretrial Statement, filed 10-7-08	737 – 740	4
Stipulation Regarding Exhibits Undisputed Facts and Witnesses, filed 10-8-08	741 – 746	4
Defendant Piercy's Closing Memorandum, filed 11-17-08	747 – 768	4
Plaintiff Guzman's Post Trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District, filed 11-28-08	769 – 879	5
Defendant Canyon County's Closing Argument and Post Trial Brief, filed 12-1-08	880 – 906	5
Post-Trial Memorandum, filed 12-3-08	907 – 939	5
Defendant Piercy's Reply Brief, filed 12-15-08	940 – 958	5
Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial, filed 1-21-09	959 – 971	6
Defendant Piercy's Second Motion for Summary Judgment, Filed 5-5-09	972 – 974	6
Memorandum in Support of Defendant Piercy's Second Motion For Summary Judgment, filed 5-5-09	975 – 980	6

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 5-5-09	981 – 987	6
Plaintiff Guzman's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment, filed 5-22-09	988 – 994	6
Defendant Sutton's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment, filed 5-22-09	995 – 1006	6
Defendant Jennifer Sutton's Motion for Reconsideration, Filed 7-30-09	1007 – 1009	6
Affidavit of Joshua S. Evett in Support of Defendant Sutton's Motion for Reconsideration, filed 7-30-09	1010 – 1071	6
Memorandum in Support of Defendant Jennifer Sutton's Motion for Reconsideration, filed 7-30-09	1072 – 1100	6
Second Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 8-6-09	1101 – 1104	6
Reply to Plaintiff's and Co-Defendant Sutton's Objections to Defendant Piercy's Second Motion for Summary Judgment, Filed 8-6-09	1105 – 1113	6
Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions, filed 8-7-09	1114 – 1128	6
Plaintiff/Defendant, Luis J. Guzman's Motion for Reconsideration, filed 8-11-09	1129 – 1131	6
Reply Brief in Support of Defendant Sutton's Motion for Reconsideration, filed 8-12-09	1132 – 1140	6
Order on Motion to Reconsider, filed 12-7-09	1141 – 1150	6
Plaintiff/Defendant Luis J. Guzman's Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1151 – 1153	6
Memorandum in Support of Plaintiff/Defendant Luis J. Guzman's Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1154 – 1178	7
Affidavit of Timothy C Walton in Support of Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and to Dismiss, filed 5-26-10	1179 – 1273	7

TABLE OF CONTENTS, Continued

	Page No.	Vol. No.
Jennifer Sutton's Brief Regarding Defenses on Reconsideration, Filed 6-2-10	1274 – 1298	7
Affidavit of Ryan B Peck, filed 6-8-10	1299 – 1322	7
Response to Motion to Reconsider, filed 6-8-10	1323 – 1342	7
Jennifer Sutton's Reply to Dale Piercy's Response to Motions To Reconsider, filed 6-10-10	1343 – 1356	8
Affidavit of Joshua S Evett in Support of Jennifer Sutton's Reply to Dale Piercy's Response to Motions to Reconsider, Filed 6-10-10	1357 – 1370	8
Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, filed 7-30-10	1370A – 1370JJ	8
Jennifer Sutton's Memorandum in Response to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, filed 8-6-10	1371 – 1387	8
Plaintiff's Reply Memorandum in Support of Motion to Dismiss And for Reconsideration, filed 8-9-10	1388 – 1392	8
Written Order Memorializing Oral Ruling on Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Jennifer Suttons Motion for Reconsideration, filed 10-5-11	1393 – 1418	8
Stipulation to Allow a IRCP 54(b) Certification, filed 1-11-12	1419 – 1423	8
Final Judgment and IRCP 54(b) Certificate, filed 1-13-12	1424 – 1425	8
Notice of Appeal, filed 2-23-12	1426 – 1436	8
Amended Notice of Appeal, filed 3-13-12	1437 – 1447	8
Defendants Luis Guzman and Jennifer Sutton's Notice of Cross-Appeal, filed 3-14-12	1448 – 1452	8
Request for Additional Record, filed 3-22-12	1453 – 1458	8
Certificate of Exhibits	1459 – 1461	8
Certificate of Clerk	1462 – 1463	8
Certificate of Service	1464 – 1465	8

INDEX

	Page No.	Vol. No.
Action for Declaratory Judgment, filed 10-15-07	470 – 502	3
Affidavit of Bill A. Staker in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	169 – 171	1
Affidavit of Dale Piercy, filed 5-17-07	126 – 128	1
Affidavit of Dawn McClure, filed 7-31-07	294 – 306	2
Affidavit of Deborah Schrecongost in Support of Plaintiffs' Motion to Strike, file 8-24-07	382 – 393	3
Affidavit of Dennis Sorrell, filed 5-16-07	119 – 121	1
Affidavit of Don Allen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	157 – 168	1
Affidavit of Erika Rivera in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	175 – 177	1
Affidavit of Glenn Koch, filed 7-9-07	134 – 136	1
Affidavit of Jennifer Sutton, filed 7-24-07	291 – 293	2
Affidavit of Jerry Deal, filed 5-16-07	116 – 118	1
Affidavit of Joshua S Evett in Support of Jennifer Sutton's Reply to Dale Piercy's Response to Motions to Reconsider, Filed 6-10-10	1357 – 1370	8
Affidavit of Joshua S. Evett in Support of Defendant Sutton's Motion for Reconsideration, filed 7-30-09	1010 – 1071	6
Affidavit of Linda Hansen in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	146 – 156	1
Affidavit of Luis Guzman in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	172 – 174	1
Affidavit of Meghan E. Sullivan in Support of Defendant Sutton's Opposition to Defendant Piercy's Motion for Summary Judgment, filed 8-28-07	405 – 417	3
Affidavit of Michael A. Pope, filed 5-2-07	86 – 113	1

INDEX, Continued

	Page No.	Vol. No.
Affidavit of Rosemary Thomas in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	178 – 182	1
Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-16-07	122 – 125	1
Affidavit of Ryan B Peck, filed 6-8-10	1299 – 1322	7
Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 5-5-09	981 – 987	6
Affidavit of Ryan B. Peck, filed 5-2-07	75 – 85	1
Affidavit of Timothy C Walton in Support of Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and to Dismiss, filed 5-26-10	1179 – 1273	7
Affidavit of Timothy C. Walton in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	212 – 271	2
Amended Action for Declaratory Relief, filed 9-11-08	678 – 699	4
Amended Complaint and Demand for Jury Trial, filed 5-19-05	23 – 25	1
Amended Notice of Appeal, filed 3-13-12	1437 – 1447	8
Amended Notice of Hearing, filed 8-2-07	345 – 346	2
Answer and Demand for Jury Trial, filed 6-20-05	26 – 31	1
Answer to Complaint and Demand for Jury Trial, filed 10-11-05	42 – 45	1
Answer to Plaintiffs' Second Amended Complaint and Demand For Jury Trial, filed 9-15-05	36 – 41	1
Answer to Plaintiffs' Third Amended Complaint and Demand For Jury Trial, filed 8-17-07	363 – 368	2
Answer to Third Party Defendant Canyon County, Idaho, Filed 11-8-07	524 – 529	3
Certificate of Clerk	1462 – 1463	8
Certificate of Exhibits	1459 – 1461	8
Certificate of Service	1464 – 1465	8

INDEX, Continued

	Page No.	Vol. No.
Complaint and Demand for Jury Trial, filed 5-10-05	20 – 22	1
Defendant Canyon County's Closing Argument and Post Trial Brief, filed 12-1-08	880 – 906	5
Defendant Jennifer Sutton's Motion for Reconsideration, Filed 7-30-09	1007 – 1009	6
Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment, filed 7-24-07	272 – 290	2
Defendant Jennifer Sutton's Pretrial Memorandum, Filed 9-2-08	648 – 661	4
Defendant Jennifer Sutton's Response and Joinder in Plaintiffs' Motion to Reconsider, filed 11-27-07	530 – 539	3
Defendant Piercy's Closing Memorandum, filed 11-17-08	747 – 768	4
Defendant Piercy's Motion for Summary Judgment, filed 5-2-07	114 – 115	1
Defendant Piercy's Objection to Plaintiffs' Motion to Reconsider, filed 12-3-07	540 – 548	3
Defendant Piercy's Reply Brief, filed 12-15-08	940 – 958	5
Defendant Piercy's Second Motion for Summary Judgment, Filed 5-5-09	972 – 974	6
Defendant Sutton's Answer to Third Amended Complaint and Demand for Jury Trial, filed 8-13-07	358 – 362	2
Defendant Sutton's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment, filed 5-22-09	995 – 1006	6
Defendant Sutton's Supplemental Brief in Opposition to New Arguments and Facts Raised by Piercy, filed 8-28-07	394 – 404	3
Defendants Luis Guzman and Jennifer Sutton's Notice of Cross-Appeal, filed 3-14-12	1448 – 1452	8
Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, filed 7-30-10	1370A – 1370JJ	8

INDEX, Continued

	Page No.	Vol. No.
Final Judgment and IRCP 54(b) Certificate, filed 1-13-12	1424 – 1425	8
Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial, filed 1-21-09	959 – 971	6
Jennifer Sutton's Brief Regarding Defenses on Reconsideration, Filed 6-2-10	1274 – 1298	7
Jennifer Sutton's Memorandum in Response to Defendant Piercy's Memorandum in Objection to Plaintiff's Motion to Dismiss and for Reconsideration, filed 8-6-10	1371 – 1387	8
Jennifer Sutton's Reply to Dale Piercy's Response to Motions To Reconsider, filed 6-10-10	1343 – 1356	8
Memorandum in Support of Defendant Jennifer Sutton's Motion for Reconsideration, filed 7-30-09	1072 – 1100	6
Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 5-2-07	46 – 74	1
Memorandum in Support of Defendant Piercy's Motion to Strike, filed 8-23-07	369 – 378	2
Memorandum in Support of Defendant Piercy's Second Motion For Summary Judgment, filed 5-5-09	975 – 980	6
Memorandum in Support of Plaintiff/Defendant Luis J. Guzman's Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1154 – 1178	7
Notice of Appeal, filed 2-23-12	1426 – 1436	8
Notice of Hearing on Plaintiffs' Motion to Reconsider, Filed 11-8-07	503 – 504	3
Order Denying Defendant Piercy's Motion for Summary Judgment, Joining Canyon County and Holding All Other Motions in Abeyance Until the Herd District's Validity is Resolved, filed 10-9-07	445 – 469	3
Order Denying Defendant Piercy's Motion to Reconsider, Filed 9-23-08	705 – 714	4
Order for Dismissal with Prejudice of Claims by Erika Rivera Only, filed 2-19-08	550 – 551	3

INDEX, Continued

	Page No.	Vol. No.
Order for Dismissal with Prejudice, filed 2-12-08	549	3
Order from Scheduling Conference Setting Bench Trial on Challenge to Canyon County Herd Districts, filed 3-27-08	552 – 556	3
Order of Clarification, filed 8-1-08	593 – 595	4
Order on Motion to Reconsider, filed 12-7-09	1141 – 1150	6
Order on Motion to Reconsider, filed 4-30-08	572 – 592	4
Order on Plaintiff's Motion to Reconsider, filed 4-3-08	563 – 565	3
Order to Amend Pleadings and Scheduling, filed 9-5-08	671 – 677	4
Plaintiff Guzman's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment, filed 5-22-09	988 – 994	6
Plaintiff Guzman's Post Trial Memorandum in Support of Upholding the Validity of Canyon County's 1982 Herd District, filed 11-28-08	769 – 879	5
Plaintiff Luis Guzman's Answer to Amended Action for Declaratory Relief, filed 9-19-08	700 – 704	4
Plaintiff/Defendant Luis J. Guzman's Motions for Reconsideration and Motion to Dismiss, filed 5-26-10	1151 – 1153	6
Plaintiff/Defendant, Luis J. Guzman's Motion for Reconsideration, filed 8-11-09	1129 – 1131	6
Plaintiff's Memorandum in Opposition to Piercy's Motion to Reconsider, filed 8-27-08	596 – 598	4
Plaintiff's Motion to Reconsider, filed 3-27-08	557 – 559	3
Plaintiff's Pretrial Conference Statement, filed 8-28-08	612 – 644	4
Plaintiff's Reply Memorandum in Support of Motion to Dismiss And for Reconsideration, filed 8-9-10	1388 – 1392	8
Plaintiff's Supplemental Memorandum in Support of Motion For Reconsideration, filed 4-21-08	566 – 571	3
Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment, filed 7-20-07	183 – 211	2

INDEX, Continued

	Page No.	Vol. No.
Plaintiffs' Memorandum in Support of Motion to Reconsider, Filed 11-8-07	505 – 523	3
Plaintiffs' Motion to Strike and Notice of Hearing, filed 8-24-07	379 – 381	3
Post-Trial Memorandum, filed 12-3-08	907 – 939	5
Pretrial Memorandum, filed 8-27-08	603 – 611	4
Register of Actions	1 – 19	1
Reply Brief in Support of Defendant Sutton's Motion for Reconsideration, filed 8-12-09	1132 – 1140	6
Reply to Plaintiff's and Co-Defendant Sutton's Objections to Defendant Piercy's Second Motion for Summary Judgment, Filed 8-6-09	1105 – 1113	6
Reply to Plaintiffs' and Co-Defendant's Responding Memorandums and Motion to Strike Co-Defendant's Supplemental Brief, filed 8-30-07	418 – 444	3
Request for Additional Record, filed 3-22-12	1453 – 1458	8
Response to Motion to Reconsider, filed 6-8-10	1323 – 1342	7
Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions, filed 8-7-09	1114 – 1128	6
Response to Plaintiff's Motion for a Ruling on Plaintiff's Motion To Reconsider, filed 3-28-08	560 – 562	3
Second Affidavit of Dale Piercy, filed 7-31-07	330 – 332	2
Second Affidavit of Rosemary Thomas in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	347 – 354	2
Second Affidavit of Ryan B. Peck in Support of Motion for Summary Judgment, filed 8-6-09	1101 – 1104	6
Second Affidavit of Ryan B. Peck, filed 7-31-07	333 – 344	2
Second Amended Complaint and Demand for Jury Trial, filed 8-30-05	32 – 35	1

INDEX, Continued

	Page No.	Vol. No.
Stipulation to Allow a IRCP 54(b) Certification, filed 1-11-12	1419 – 1423	8
Stipulation to Amend Pleadings and Scheduling, filed 9-4-08	662 – 670	4
Stipulation Regarding Exhibits Undisputed Facts and Witnesses, filed 10-8-08	741 – 746	4
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-9-07	137 – 145	1
Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 7-31-07	307 – 329	2
Supplemental Pretrial Memorandum, filed 9-23-08	721 – 722	4
Third Amended Complaint and Demand for Jury Trial, Filed 6-6-07	129 – 133	1
Third Party Defendant Canyon County's Answer to Plaintiff Piercy's Amended Action for Declaratory Relief, filed 9-24-08	723 – 728	4
Third Party Defendant Canyon County's Fifth Amended Pretrial Statement, filed 10-7-08	737 – 740	4
Third Party Defendant Canyon County's First Amended Pretrial Statement, filed 8-29-08	645 – 647	4
Third Party Defendant Canyon County's Fourth Amended Pretrial Statement, filed 10-6-08	733 – 736	4
Third Party Defendant Canyon County's Pretrial Statement, Filed 8-27-08	599 – 602	4
Third Party Defendant Canyon County's Third Amended Pretrial Statement, filed 10-3-08	729 – 732	4
Third Party Defendant Jennifer Sutton's Answer to Amended Action for Declaratory Relief, filed 9-23-08	715 – 720	4
Third Supplemental Memorandum in Support of Defendant Piercy's Motion for Summary Judgment, filed 8-9-07	355 – 357	2
Written Order Memorializing Oral Ruling on Plaintiff/Defendant Luis J Guzman's Motion for Reconsideration and Motion to Dismiss and Defendant Jennifer Suttons Motion for Reconsideration, filed 10-5-11	1393 – 1418	8

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A.M. 103 P.M.

JAN 21 2009

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

**LUIS J. GUZMAN, individually,
Plaintiff,**

vs.

**DALE PIERCY, individually, and
JENNIFER SUTTON, individually,
Defendants.**

**DALE PIERCY, individually,
Plaintiff,**

vs.

**CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually,**

Defendants.

CASE NO. CV-2005-4848

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL**

This litigation comprises a civil matter that possesses a bifurcated bench trial portion. In this part of the trial, the parties ask this court to determine whether the Canyon County Commissioners in 1982 followed the procedures mandated by Idaho Code to create a herd district and/or to consolidate pre-existing herd districts into one. The essence of what the parties ask this court to find centers on whether Dale Piercy (Piercy), denominated the plaintiff for this portion of the trial, has overcome the presumption of validity of the "1982 herd district" or, in the alternative, the consolidation

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 1**

of several herd districts into one in Canyon County (County) that year. For the reasons set out below, the court finds that Piercy has overcome the presumption of validity of a herd district consolidation attempted by the Canyon County Commissioners in 1982.

Essentially, the County has simply elected to rely upon the presumption of validity of its 1982 Herd District Ordinance.¹ The County failed to produce even one document showing the Board of Commissioners followed the statutory requirements for creating or modifying herd districts in 1982. Put another way, after Piercy sufficiently established that the Board failed to follow the procedures of the Idaho Code, the County failed to show affirmatively that a factual basis exists for the court to adhere to the presumption of validity. The election to rely solely on the presumption of validity is fatal to the County's cause. The County's (together with Guzman's and Sutton's) scheme of simply relying on the presumption of validity falls well short of the mark.²

The court gave the County every opportunity to show how its county commission complied with the statutes in 1982. The County failed to do so. The court informs all parties that it bases its finding upon what it perceives as a clear showing on the part of Piercy. The court further informs the parties that it finds Piercy introduced substantial evidence of the nonexistence of the fact that the Canyon County Board of Commissioners failed to follow the statutory procedure in relation to herd districts. No one should consider the court's decision as a critical or negative view of what the Board

¹ See Idaho Code § 31-857.

² This is not to say that Guzman's counsel did not conduct a cross examination of Piercy's witnesses that should be preserved for law students covering how cross-examination should take place. Indeed, Guzman's counsel is an extremely talented advocate and practices at a high level. He found every "hole" in the testimony of Piercy's witnesses. Nevertheless, the court, in its "fact-finding mission," is clearly more persuaded by their testimony on direct. The court has no doubt whatsoever that no landowners petitioned the Board to consolidate or "fix" the Herd District dilemma in Canyon County in 1982.

attempted to do. Indeed, the record supports the notion they perceived a problem and attempted to “fix it” with regard to confusion over the county’s “crazy quilt” of herd districts, including overlapping issues. Nevertheless, the record also clearly supports the fact that not one landowner in the area affected, let alone a majority of the landowners in the area affected, who also happened to qualify as electors of the state, petitioned the county commissioners to “fix the problem.” In other words, the court is clearly convinced that Piercy has overcome the presumption established in Idaho Code § 31-857, and which Rule 301 of the Idaho Rules of Civil Procedure addresses for purposes of how presumptions may be overcome. Here, then, the court, as the trier of fact determines that the presumed fact does not exist without regard to the presumption, in accordance with Rule 301(a) of the Idaho Rules of Civil Procedure.²

I.

FACTS AND PROCEDURE

Piercy well states the facts in his Closing Memorandum; hence, the court adopts them as restated herein. Piercy ranches and farms near Parma, Idaho, a small community located in Canyon County. He has followed this profession for most of his life. In March 2005, Piercy pastured several bulls in a field north of the Boise River, south of Parma, and immediately to the east of Wamstad Road. One of the bulls got out. Defendant Jennifer Sutton (Sutton) struck the bull as she drove down the road, injuring her passengers.

² This follows because the court finds that Piercy met the burden of going forward.

For purposes of this portion of the bi-furcated trial, based upon the depositions submitted and the live testimony offered at the bench trial conducted by the court on 8 October 2008, the court specifically finds the following:

A. FINDINGS OF FACT ESTABLISHED BY A CLEAR SHOWING

- That at the time the Canyon County Board of Commissioners adopted their "ORDER ESTABLISHING HERD DISTRICT" they did so without the benefit of a petition by "a majority of the landowners in any area or district described by metes and bounds not including open range," who resided in the area or district described, and who were qualified electors at the time of making their petition to create a herd district.
- The following deposition testimony provides evidence in support of the finding immediately above:

(1) The RESOLUTION PASSED REGARDING HERD DISTRICTS IN CANYON COUNTY found in the minutes of the Board of County Commissioners in Book 27, Page 207 in the Canyon County Recorder's Office, and adopted on December 2, 1982, does not refer to any petition. Instead, the resolution simply refers to confusion existing due to over-lapping lines of herd districts and open range, and the desire of the commissioners to make all of Canyon County to be herd district as of December 14, 1982.

(2) The deposition of Bill A. Staker, the elected Clerk of Canyon County at the time of the adoption of the referenced resolution and subsequent "ORDER ESTABLISHING HERD DISTRICT," which he gave in Salt Lake City, Utah, on

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 4**

September 22, 2008, read as a whole, demonstrates he has no independent recollection or knowledge of any petition for consolidation of herd districts or the creation of a county-wide herd district in the years 1980, 1981, or 1982.³

(3) The deposition of Linda Landis given on July 7, 2008, shows that she has been a secretary in the Canyon County Prosecutor's Office since October 2005; that she maintains the records in the prosecutor's office; but it adds little to the record except for Exhibits A, B, and C,⁴ which are attached to her deposition.⁵

(4) Similarly, the deposition of the current Canyon County Clerk, William Hurst, given on July 7, 2008, brings little to the table other than the same Exhibit A, complete with a black-and-white "survey map" referenced in the ORDER ESTABLISHING HERD DISTRICT attached to the deposition of Linda Landis as Exhibit A, conforms to a larger map that hangs on a bulletin board somewhere in the Canyon County Courthouse.

(5) The deposition of Glenn Koch, a former Canyon County Commissioner, and, apparently, the only surviving Commissioner voting on the 1982 Herd District Resolution, also amounts to a "nothing" insofar as his independent recollection is concerned on the 1982 Resolution creating a Herd District. Nevertheless, at least one

³ Lacking an independent recollection means it neither helps nor hinders the presumption: it amounts to a "nothing."

⁴ Landis Deposition Exhibit A corresponds to Joint Exhibits 2 & 7; Exhibit B corresponds to Joint Exhibits 8 & 9; and Exhibit C corresponds to Joint Exhibit 3. All Joint Exhibits comprise a part of the trial record.

⁵ As already noted, the resolution mentions nothing about a petition. The court believes this is because no petition creating the 1982 Herd District exists. Instead, in 1982, the Board, reacting to an apparent perceived need, solved the problem by Resolution, not by petition. Nothing in the "ORDER ESTABLISHING HERD DISTRICT," as set out in Exhibit A to Linda Landis's deposition suggests a petition. Yet, Exhibit C (Joint Exhibit 3), has attached to it minutes from Books 3 and 4 of (presumably) the Board's record of minutes. This clearly shows that in the early part of the Twentieth Century the Board created Herd Districts based upon petitions as contemplated by the Idaho Code, not based upon a "review" and determination "by resolution."

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 5**

of the exhibits attached to his deposition corroborate the lack of a petition as the “driver” to the last Herd District Ordinance. Exhibit 3⁶ to Koch’s deposition, a copy of the minutes of how the Board passed the 1982 Resolution regard herd districts in Canyon County, makes no mention of a petition.


(6) The deposition of E. G. Johnson, taken on October 6, 2008, shows he owns a parcel of land primarily north of, but also on, the Boise River in Canyon County. Mr. Johnson’s deposition further shows that at the time of the County’s 1982 Herd District “Order,” he served as the President of the Idaho Cattle Feeders Association and further enjoyed membership in the Idaho Cattlemen’s Association (now consolidated at the Idaho Cattle Association). He is certain that no questions arose in either Association regarding Canyon County’s intent on placing his property (which, according to the map attached to his deposition as Exhibit 2,⁷ would also have included Dale Piercy’s property) into a Herd District. According to the 1982 Order with the map referenced, neither Johnson’s nor Piercy’s property had been a part of any herd district before December 1982. Their land comprised part of the 5% not within a Herd District referenced in the “ORDER ESTABLISHING HERD DISTRICT” set out in Joint Exhibit 4.

B. CONCLUSIONS OF LAW

Based upon the forgoing Findings of Fact, the court concludes as follows:

⁶ The trial record has this exhibit as Joint Exhibit 4.

⁷ This exhibit is the same as Joint Exhibit 2 in the trial record except for the notation “my property” in the deposition exhibit indicating Johnson’s property (Section 25), which is only “circled” on the Joint Exhibit. Furthermore, Joint Exhibit 2 shows Dale Piercy’s property in question with a yellow sticky attached thereto containing an arrow pointing down to the section in question owned by Piercy.



- That the Canyon County Commissioners in 1982 did not follow the statutory procedures in creating or consolidating Herd Districts in Canyon County, and specifically, the Board took action without the benefit of a majority of the landowners affected by the proposed district, who are also electors, signing a petition and presenting it to the Board asking for the creation of a Herd District.

- That since the County Commissioners did not follow the statutory procedures, the purported ORDER ESTABLISHING HERD DISTRICT is illegal, hence void, and the “presumption” upon which Canyon County, Luis Guzman, and Jennifer Sutton rely, does not overcome the proof presented by Piercy.

- That since the court finds no petition existed for the establishment the 1982 ORDER ESTABLISHING HERD DISTRICT, the court need no dwell on the other objections raised by Piercy regarding the insufficiency of the order.

II.

ANALYSIS

Although the court covered much of this material in its order that denied Piercy summary judgment in October 2007, for context to how the court arrives at the decision it has, it bears repeating.

A. THE STATUTES

At the time the Canyon County Board of Commissions entered its purported ORDER ESTABLISHING HERD DISTRICT in December 1982, the 1968 version of Idaho Code §25-2401 *et seq.* established the criteria for creating a herd district. This set of statutes gives the board of county commissioners in a particular county the right

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 7**

to create herd districts, setting forth procedures by which the board would create such districts. The three relevant statutes follow:

I.C. 25-2402 Petition for district

A majority of the landowners in any area or district described by metes and bounds not including open range and who are resident in, and qualified electors of, the state of Idaho may petition the board of county commissioners in writing to create such area a herd district. Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large, also prohibiting said animals from being herded upon the public highways in such a district; and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards in roads penetrating the district as to prevent livestock, excepting swine, from roaming, drifting, or straying from open range into the district; and may designate the period of the year during which it is desired to prohibit such animals from running at large, or being herded on the highways. Provided, any herd district heretofore established shall retain its identity, geographic definition, and remain in full force and effect, until vacated or modified hereafter as provided by section 25-2404, Idaho Code, as amended.

Idaho Code §25-2402 (1968) (Emphasis supplied).

I.C. 25-2403 Notice of hearing petition (1968)

It shall be the duty of the board of county commissioners, after such petition has been filed, to set a date for hearing said petition, notice of which hearing shall be given by posting notices thereof in three (3) conspicuous places in the proposed herd district, and by publication for two (2) weeks previous to said hearing in a newspaper published in the county nearest the proposed herd district.

Idaho Code §25-2403 (1968)

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 8**

I.C. 25-2404 Order creating district (1968)

At such hearing, if satisfied that a majority of the landowners owning more than fifty per cent (50%) of the land in said proposed herd district who are resident in, and qualified electors of, the state of Idaho are in favor of the enforcement of the herd law therein, and that it would be beneficial to such district, the board of commissioners shall make an order creating such herd district, in accordance with the prayer of the petition, or with such modifications as it may choose to make. Such order shall specify a certain time at which it shall take effect, which time shall be at least thirty (30) days after the making of said order; and said order shall continue in force, according to the terms thereof, until the same shall be vacated or modified by the board of commissioners, upon the petition of a majority of the landowners owning more than fifty per cent (50%) of the land in said district who are resident in, and qualified electors of, the state of Idaho.

Idaho Code §25-2404 (1968) (Emphasis supplied).

As previously noted by the court, the lessons gleaned from these sections of the Code indicate that:

- A majority of landowners may petition for a herd district;
- If such petition is made, it will set forth a description of the requested district and state the animals to be included or exempt from the herd district;
- Notice is to be given in three (3) locations and published in a newspaper in the county of the proposed district for two (2) weeks prior to the hearing;
- The board of commissioners may create a herd district by order either “in accordance with the prayer of the petition, or with such modifications as it may choose to make”

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 9**

- An order creating a herd district shall specify a date, after 30 days, when the district will take effect.

Previously, Piercy argued that the order as entered by the Commissioners, and as set forth above, is invalid because it failed to reference the landowner petition; it failed to provide a metes and bounds description of the herd districts to be created; it failed to provide which breeds of animals are subject to the herd district; and finally, it failed to set forth any date when the herd district went into effect. Piercy contended these flaws overcome the presumption of validity of the herd district; hence, this court must strike it down. At that time, the court disagreed with Piercy's position. After the benefit of a trial on the issue, and seeing firsthand how the county failed at virtually every level to follow the Code, the court no longer disagrees with Piercy.⁹

B. THE BURDEN OF PROOF

The court concludes that counsel for Piercy has correctly analyzed the burden of proof, including who has it at the outset, how the burden of going forward might shift, and the level of proof required in DEFENDANT PIERCY'S REPLY BRIEF; hence, the court need not detail much analysis here. It is enough to say that the case relied upon by Piercy, *Cole–Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970), *reh'g denied*, is consistent with the effect of presumptions as now contained in IRE 301(a), though it contains stronger language from days gone by.

(a) Effect. In all civil actions and proceedings, unless otherwise provided for by statute, by Idaho appellate

⁹ At the time of Piercy's original motion for summary judgment, Canyon County had not entered as a party and the other parties did not have the benefit of any "inside" information of what the County may have done to satisfy the Code requirements. Ironically, in hindsight, the court could just as easily have entered judgment on behalf of Piercy based upon his original motion for summary judgment.

decisions or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption.

IRE 301(a)(Emphasis supplied).

Here, Piercy had the burden of proof throughout, namely, the burden of proving the invalidity of the 1982 Herd District, thus, proving a negative. Canyon County and its allies, Luis Guzman and Jennifer Sutton, had the advantage of a presumption (based upon the passage of time) that the 1982 Order was valid as entered. Nevertheless, after the evidence presented by all sides, and following the procedure outlined in IRE 301(a), the court concludes no petition for the creation of the Herd District ever existed. Accordingly, Piercy overcame the presumed fact of the Herd District's validity.

Similarly, in *Cole-Collister Fire Protection Dist. v. City of Boise, supra*, the district court declared an ordinance void in the face of the presumption of its validity, and our state Supreme Court upheld the trial court's decision. In doing so, the Court emphasized that

[T]he burden of proof devolved upon the [Fire Protection District], at the district court level, to show that the zoning ordinance as applied to the property in question was confiscatory, arbitrary, unreasonable and void. [Internal cite]

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 11**

omitted.] This burden the [Fire Protection District] has sustained as demonstrated by the ample evidence contained in the record to support the legal conclusion that the zoning ordinance was unlawful as applied to the [Fire Protection District's] property.

Once the [Fire Protection District] overcame the presumption of validity by introducing evidence tending to show that the ordinance in question has been unreasonably applied to his property, the burden was the shifted to Boise City to come forward with the evidence to rebut the [Fire Protection District's] evidence and to show that the ordinance was valid.

93 Idaho at 563, 468 P.2d at 295.

III.

CONCLUSION

Based upon the foregoing, the court concludes that Canyon County's 1982 ORDER ESTABLISHING HERD DISTRICT is invalid since Dale Piercy overcame the presumption of its validity. Specifically, the court concludes that no landowners within land not contained in a Canyon County Herd District, as required by Idaho statutes, ever presented the Canyon County Commissioners with a petition requesting that their property be made a part of a herd district or that it be consolidated within the pre-existing herd districts of Canyon County. Accordingly, the court concludes no herd district existed at the location of the horrific accident involving Luis Guzman and Jennifer Sutton and Dale Piercy's bull.

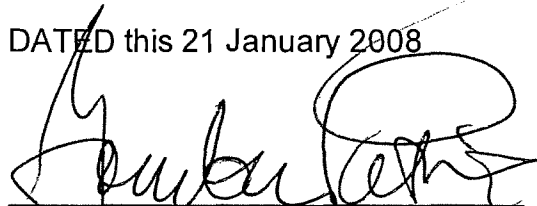
THEREFORE, THIS ORDERS, ADJUDGES, AND DECREES THAT:

1. The 1982 ORDER ESTABLISHING HERD DISTRICT is invalid and void.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 12

2. Neither Plaintiff Luiz Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy's bull in Canyon County in 2005.

DATED this 21 January 2008



GORDON W. PETRIE, District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on 21 January 2009 s/he served a true and correct copy of the original of the forgoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED PORTION OF TRIAL** on the following individuals in the manner described:

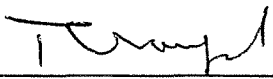
- Upon the Canyon County Prosecutor,

when s/he placed the same into the latter's respective "pick up" boxes at the Canyon County Clerk's office, Canyon County Courthouse, Caldwell, Idaho; and upon

- Timothy C. Walton, CHASAN & WALTON LLC, at PO Box 1069, Boise, ID 83701-1069, and upon Stephen E. Blackburn, BLACKBURN LAW PC, at 660 E. Franklin Road, Suite 255, Meridian, ID 83642, attorneys for Plaintiff Luis Guzman; and upon
- Joshua S. Evett, ELAM & BURKE, attorneys for Defendant Jennifer Sutton, at P.A., PO Box 1539, Boise, ID 83701

when s/he caused the same to be deposited into the US Mails, sufficient postage attached.

WILLIAM H. HURST, Clerk of the Court

By: _____
Deputy Clerk of the Court

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED
PORTION OF TRIAL – 13**

Rodney R. Saetrum, ISB: 2921
Ryan B. Peck, ISB: 7022
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101 S. Capitol Blvd
Boise, Idaho 83702
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F I L E D
A.M. ~~4~~ P.M.

MAY 05 2009

**CANYON COUNTY CLERK
C. DYE, DEPUTY**

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,

Plaintiff,

v.

DALE PIERCY, individually, and JENNIFER
SUTTON, individually,

Defendants.

Case No. CV05-4848

**DEFENDANT PIERCY'S
SECOND MOTION FOR
SUMMARY JUDGMENT**

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually,

Defendants.

COMES NOW Defendant, Dale Piercy, by and through his attorney of record, Ryan B. Peck, pursuant to I.R.C.P. 56(a), and requests that this Court order that Defendant Piercy's Motion for Summary Judgment be granted and that Defendant Piercy be dismissed with prejudice from the above-captioned matter for the reason that Defendant Piercy owed no duty to Plaintiff that would

DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 1

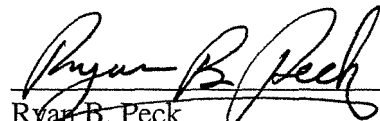
create liability in this action pursuant to I.C. §§ 25-2118, 25-2402-2404 and Idaho case law.

This motion is supported by the memorandum and affidavit filed herewith, previously submitted affidavits and depositions and the Court's Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial filed on January 21, 2009.

Oral argument is requested.

DATED this 5th day of May 2009.

SAETRUM LAW OFFICES


Ryan B. Peck
Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of May 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Timothy C. Walton
CHASAN & WALTON LLC
1459 Tyrell Lane
P.O. Box 1069
Boise, ID 83701-1069

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Stephen E. Blackburn
BLACKBURN LAW PC
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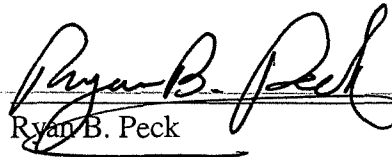
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Ryan B. Peck

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A.M. 10:11 P.M.
MAY 05 2009
CANYON COUNTY CLERK
C. DYE, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,

Plaintiff,

v.

DALE PIERCY, individually, and JENNIFER
SUTTON, individually,

Defendants.

Case No. CV05-4848

**MEMORANDUM IN SUPPORT
OF DEFENDANT PIERCY'S
SECOND MOTION FOR
SUMMARY JUDGMENT**

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually,

Defendants.

I. RELEVANT FACTUAL BACKGROUND

Dale Piercy is a rancher and farmer in the Parma, which is within Canyon County. Mr. Piercy has been a rancher and farmer in the Parma area for most of his life. (Deposition of Dale

**MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S SECOND MOTION FOR
SUMMARY JUDGMENT - 1**

Piercy, p. 5 ln. 15-21.) In March of 2005, Mr. Piercy was pasturing approximately nine bulls in a field that was north of the Boise River, south of Parma and to the immediate east of Wamstad Road. (*Id.* at p. 19 ln. 7 and p. 22, ln. 18-19.) One of Mr. Piercy's bulls got out of the field where it was being pastured and was hit by a vehicle being driven by Jennifer Sutton. These facts were adopted by the Court in its Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial filed on January 21, 2009.

Defendant Piercy also incorporates all the affidavits and evidence submitted in support of his initial motion for summary judgment.

II. STANDARD OF ADJUDICATION

Summary judgment under I.R.C.P. 56(c) can be granted by a trial court when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986). In ruling on a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. All reasonable inferences of fact must be drawn in favor of the nonmoving party. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). Additionally, The burden of proving the absence of material facts is upon the moving party.

Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. The nonmoving party may not rest upon the mere allegations or denials contained in the pleadings, but must come forward and produce evidence by affidavits or as otherwise provided in the rules to set forth specific facts showing that there is a genuine issue for trial (citations omitted).

MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 2

Levinger v. Mercy Medical Center, Nampa, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003) (parenthesis added). The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Thompson v. City of Lewiston*, 137 Idaho 473, 475-76, 50 P.3d 488, 490-91 (2002).

The construction of a legislative act presents a pure question of law for this Court to decide. *Crawford v. Dept. of Corrections*, 133 Idaho 633, 635, 991 P.2d 358, 360 (1999). Courts also exercise free review over the interpretation of statutes. *Adamson v. Blanchard*, 133 Idaho 602, 605, 990 P.2d 1213, 1216, (1999)(construing Idaho Code § 25-2118 and Idaho Code § 25-2119 together as they were adopted at the same time.)

IV. LAW AND ANALYSIS

Mr. Piercy bears no liability for the injuries incurred by Plaintiffs in the subject vehicle accident for the following reasons: (1) The bull that was involved in the subject accident was being pastured in an open range area pursuant to the Court's recent ruling and (2) Mr. Piercy is statutorily immune from liability for the accident under I.C. § 25-2118 and I.C. § 25-2402(1).

A. The Court's Findings of Fact and Conclusions of Law Filed on January 21, 2009, Hold that the Area Where Mr. Piercy Pastured the Subject Bull was Open Range.

The Court stated:

THEREFORE, THIS ORDERS, ADJUDGES AND DECREES THAT:

1. The 1982 ORDER ESTABLISHING HERD DISTRICT is invalid and void.

MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 3

2. Neither Plaintiff Luiz Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy's bull in Canyon County in 2005.

B. Mr. Piercy is Not Liable for the Subject Accident Because the Bull Involved in the Accident was Being Pastured in an Open Range Area.

Two Idaho Code statutes apply in this case to provide Mr. Piercy with immunity from liability for the Plaintiffs' damages in the present case.

Idaho Code § 25-2118 provides:

No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal. "Open range" means all uninclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.

Idaho Code § 25-2402(1), in relevant part states: "and shall designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards as needed in roads penetrating the district so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district;."

Mr. Piercy was pasturing his bull in an open range area. The accident occurred on Wamstad Rd. on or near a bridge that was straddling a boundary between open range and the boundary of a herd district. The area just south of the bridge over the Boise River where the

MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 4

accident took place was allegedly within the boundaries of a herd district that was established on July 18, 1908 (1908 herd district).

I.C. § 25-2402(1) allows immunity for Mr. Piercy's bull from the 1908 herd district, because Mr. Piercy's bull came from open range and the 1908 herd district was not "inclosed" by a lawful fence and there were no cattle guards on the road connecting the open range to the 1908 herd district. (Affidavit of Ryan B. Peck in Support of Defendant Piercy's Second Motion for Summary Judgment, Affidavit of Dale W. Piercy.)

The Idaho Supreme Court upheld and emphasized the provision in I.C. § 25-2402(1), in *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986). The Supreme Court stated: "We hold, therefore, that a herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is inclosed by lawful fences and cattle guards in roads penetrating the district." *Id.*

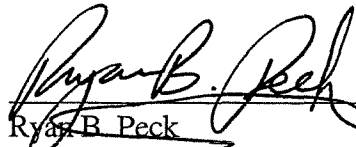
Wamstad road does not have cattle guards to prevent livestock from crossing into the 1908 herd district at the point at which it separates the open range area from the herd district. Therefore, I.C. § 25-2402(1) does not eliminate the immunity for Mr. Piercy under I.C. § 25-2118 even assuming Mr. Piercy's bull crossed over into the 1908 herd district.

Mr. Piercy's motion for summary judgment should be granted in that he is statutorily immune from liability for the subject accident.

MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 5

DATED this 5th day of May 2009.

SAETRUM LAW OFFICES



Ryan B. Peck

Attorneys for Defendant Dale Piercy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of May 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

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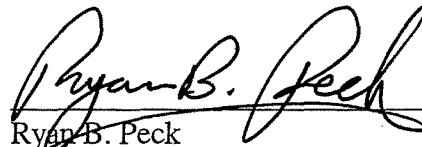
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Canyon County Courthouse
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Ryan B. Peck

Attorneys for Defendant Dale Piercy

MEMORANDUM IN SUPPORT OF DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 6

Rodney R. Saetrum, ISBN: 2921
Ryan B. Peck, ISBN: 7022
SAETRUM LAW OFFICES
Post Office Box 7425
Boise, Idaho 83707
Telephone: (208) 336-0484

FILED
A.M. 4:10 P.M.

MAY 05 2009

**CANYON COUNTY CLERK
C. DYE, DEPUTY**

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,

Plaintiff,

v.

DALE PIERCY, individually, and JENNIFER
SUTTON, individually,

Defendants.

Case No. CV05-4848

**AFFIDAVIT OF RYAN B. PECK
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually,

Defendants.

COMES NOW, Ryan B. Peck, who first being duly sworn upon his oath and deposes and
says as follows:

1. That I am a attorney for Saetrum Law Offices, who represents Defendant Dale
Piercy, and I make this affidavit of my own personal knowledge;

AFFIDAVIT OF RYAN B. PECK - 1

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of May 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

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Canyon County Courthouse
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Caldwell, ID 83605

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Ryan B. Peck

EXHIBIT "A"

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Boise, Idaho 83702
Telephone: (208) 336-0484

FILED
AM. 12:30 PM.

MAY 17 2007

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA by and through LOREE
RIVERA her mother and natural guardian AND
LUIS J. GUZMAN by and through
BALLARDO GUZMAN his father and natural
guardian,

Plaintiffs,

v.

DALE PIERCY, individually, and JENNIFER
SUTTON, individually,

Defendants.

Case No. CV05-4848

AFFIDAVIT OF DALE PIERCY

I, Dale Piercy, being first duly sworn, deposes and says as follows:

1. Affiant is a Co-Defendant in this case and has been a farmer and rancher in the Parma\Wilder area for over 30 years and bases this Affidavit on his own personal knowledge and belief.
2. Affiant attests that the bull involved in the subject accident, which occurred on March 20, 2005, on Wamstad Road approximately where it goes over the Boise River, was being pastured in a field that borders the north bank of the Boise River and the east side of Wamstad Road, which field is in the area shaded in green on

AFFIDAVIT OF DALE PIERCY - 1

Exhibit A to the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment.

3. The bull was being pastured in this field at the time of the accident and prior to the accident.
4. The field described above is not within the limits of any city or village.
5. There are no cattle guards or fences on Wamstad Road at the point where it leaves the area on Exhibit A which is outlined in red and striped in blue and enters the area outlined in orange.

Further your Affiant sayeth naught.

DATED this 15th day of May 2007.

Dale W Piercy
Dale Piercy

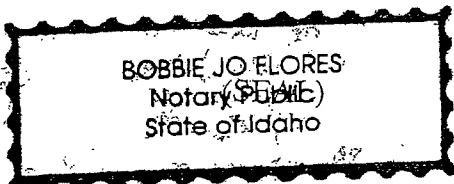
STATE OF IDAHO)

: ss.

County of Canyon)

On this 15th day of May 2007, before me, a Notary Public, personally appeared DALE PIERCY, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.



Bobbie Jo Flores
Notary Public, State of Idaho
Residing at: Parma, Idaho
My Commission Expires: 8-9-09

AFFIDAVIT OF DALE PIERCY - 2

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16 day of May 2007, I caused a true and correct copy
of the foregoing document to be served by the method indicated below and addressed to:

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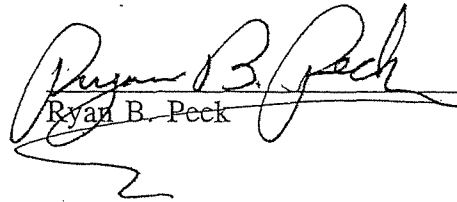
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Attorneys for Plaintiff Luis J. Guzman

F I L E D
A.M. 1:30 P.M.
MAY 22 2009

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN,

Plaintiff,

vs.

DALE W. PIERCY, individually and
JENNIFER SUTTON individually,

Defendants.

CANYON COUNTY

Third Party Defendant.

Case No: CV05-4848

**PLAINTIFF GUZMAN'S
MEMORANDUM IN
OPPOSITION TO DEFENDANT
PIERCY'S SECOND MOTION
FOR SUMMARY JUDGMENT**

On March 20, 2005, Erika Rivera and Luis Guzman were seriously injured when the vehicle in which they rode as passengers (which vehicle was driven by Defendant Jennifer Sutton (Sutton)) collided with a bull owned by Defendant Dale Piercy (Piercy) on Wamstad

Road in Canyon County, just south of Parma, Idaho. Erika Rivera has settled her claim and is no longer a party to this suit.

The accident occurred in a herd district created by the Canyon County Commissioners in 1908. Piercy's bull was pastured in a herd district created by the Canyon County Commissioners in 1982. The border between the two herd districts is the Boise River. Piercy's bull escaped Piercy's pasture and was hit by Sutton's car a few hundred yards from Piercy's pasture, on the other side of the Boise River from Piercy's pasture.

Despite the fact that Piercy has been a farmer and rancher in Canyon County for some 50 years, and despite the fact that Piercy lived under, conducted business under, and benefited from the protections of the 1982 herd district ordinance for some 23 years prior to this horrific accident, Piercy challenged the validity of the 1982 herd district ordinance. Specifically, Piercy claimed that the Canyon County Commissioners failed to follow statutory procedure in the creation of the ordinance.

In October 2008 Judge Petrie held a bench trial on the issue of whether the 1982 herd district was validly formed. In January 2009 Judge Petrie issued his decision, concluding that the 1982 herd district was not properly formed. Piercy now moves for summary judgment based upon Judge Petrie's January 2009 decision.

Plaintiff Guzman objects to the entry of summary judgment in favor of Piercy. Plaintiff Guzman contends that summary judgment for Piercy is improper because:

1. Piercy is equitably estopped, and/or is prevented by the doctrine of quasi estoppel, from contesting the validity of the 1982 herd district;

2. Piercy is estopped by laches from contesting the validity of the 1982 herd district;
3. Piercy's claim that the 1982 herd district is invalid is barred by the statute of limitations;
4. Per IC 25-2402, even if the bull was pastured in open range (as Piercy contends) since the accident occurred in a herd district created in 1908 (the validity of the 1908 herd district is not subject to dispute), Piercy is not immune from liability.
5. Irrespective of the validity of the 1982 herd district, Piercy violated Canyon County Ordinance 03-05-17. Piercy was therefore negligent per se, and is subject to liability for Guzman's injuries.
6. The findings of fact and conclusions of law of Judge Petries' January 21, 2009 decision are not supported by the evidence.

Plaintiff Guzman relies upon the following to support his objection to Piercy's motion for summary judgment:

1. Defendant Sutton's Memorandum in opposition to Defendant Piercy's second motion for summary judgment, which memorandum, and the facts and legal arguments incorporated therein are adopted by Plaintiff Guzman for purposes of opposing Defendant Piercy's second motion for summary judgment.
2. Plaintiffs' July 20, 2007 memorandum in opposition to Piercy's motion for summary judgment and the evidence cited therein;

3. Plaintiffs' August 22, 2007 Memorandum in support of motion to strike, or, in the alternative, Plaintiffs' second memorandum opposing Piercy's motion for summary judgment and the evidence cited therein;
4. The June 5, 2007 affidavit of Allen in Opposition to Piercy's motion for summary judgment;
5. The June 6, 2007 affidavits of Guzman and Rivera in opposition to Piercy's motion for summary judgment;
6. The June 6, 2007 affidavit of Koch in opposition to Piercy's motion for summary judgment;
7. The June 12, 2007 affidavit of Staker in opposition to Piercy's motion for Summary judgment;
8. The June 20, 2007 affidavit of Walton (and exhibits attached thereto) in opposition to Piercy's motion for summary judgment;
9. Plaintiff's November 6, 2007 Memorandum in support of Plaintiffs' motion to reconsider and the evidence cited therein;
10. Plaintiff Guzman's post-trial memorandum in support of upholding the validity of Canyon County's 1982 herd district and the evidence cited therein;
11. The filings of Defendant Sutton in opposition to Piercy's motions for summary judgment and the evidence cited therein;

As pointed out by Defendant Sutton in her May 21, 2009 memorandum opposing Piercy's second motion for summary judgment, at the time the 1908 herd district where this accident occurred was created, the Idaho Code did not require that the 1908 herd district

be enclosed by fences and cattle guards to prevent livestock from straying from open range into the herd district. That statutory requirement was not added to I.C. 25-2402 until 1963, and the 1963 amendment was not made retroactive by the legislature.

Because this bull/automobile wreck occurred within the 1908 herd district, Piercy is subject to herd district liability for Guzman's injuries even if his bull was pastured in open range, as Piercy contends.

Additionally, Piercy's bull was running at large in violation of Canyon County Code 03-05-17. Thus, irrespective of Piercy's liability under herd district law, Piercy is negligent per se, and liable to Guzman, because he was in violation of Canyon County Code 03-05-17.

Moreover, it is simply unfair to allow Piercy to argue after the fact (after he has injured Guzman) that the 1982 herd district is invalid. Piercy has lived under and done business under the 1982 herd district ordinance for over 27 years. He benefited from the 1982 herd district. Because livestock within the 1982 herd district was contained in fenced pastures, Piercy's farm crops were protected from being eaten, over-run and trampled by other ranchers' livestock. When Piercy drove on the roads and highways within the 1982 herd district (within which he owned property, including the pasture where his bull was pastured), Piercy enjoyed the protection provided by the 1982 herd district, since the herd district laws required that livestock be kept off of Canyon County's roads. Piercy's insurer acknowledged the existence and validity of the 1982 herd district when the insurer paid for damage to two vehicles as a result of Piercy's livestock escaping their pasture (inside of the 1982 herd district) in a 2001 incident. It is simply wrong and unfair, and Piercy is estopped from contending (**after** he has severely injured two children) that the 1982

ordinance is invalid.

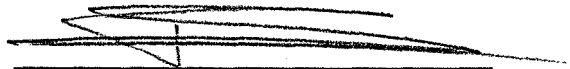
Finally, the evidence adduced at the October 2008 bench trial was inadequate to overcome the statutory presumption that the 1982 herd district is valid.

Guzman therefore requests that Piercy's motion for summary judgment be denied.

Because the Judge currently assigned to this case is unfamiliar with the proceedings to date in this case, and because oral argument will assist the Court in deciding Piercy's motion for summary judgment, Plaintiff Guzman requests oral argument on Piercy's summary judgment motion.

DATED this 21st day of May, 2009.

Chasan & Walton, LLC



Timothy C. Walton, Attorney for
Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21ST day of May, 2009, a true and correct copy

of the above and foregoing document was served upon by:

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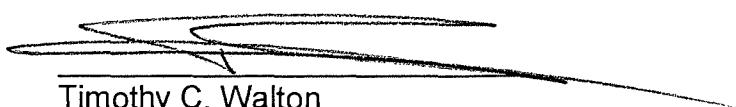
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Attorneys for Defendant Jennifer Sutton

F I L E D
A.M. 7:50 P.M.
MAY 22 2009 ✓
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually)

Plaintiff,)

v.)

DALE PIERCY, individually and)
JENNIFER SUTTON, individually,)

Defendants.)

DALE PIERCY, individually,)

Plaintiff,)

CANYON COUNTY, LUIS GUZMAN,)
individually and JENNIFER SUTTON,)
individually,)

Defendants.)

Case No. CV05-4848

DEFENDANT SUTTON'S
MEMORANDUM IN OPPOSITION TO
DEFENDANT PIERCY'S SECOND
MOTION FOR SUMMARY JUDGMENT

DEFENDANT SUTTON'S MEMORANDUM IN OPPOSITION TO DEFENDANT PIERCY'S
SECOND MOTION FOR SUMMARY JUDGMENT- 1

I. INTRODUCTION

Defendant Jennifer Sutton, by and through her attorneys of record, Elam & Burke, P.A., hereby submits this Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment. For the reasons set forth below, Defendant Piercy's Motion should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a motor vehicle collision with a black bull occurring in the late evening hours of Sunday, March 20, 2005. Defendant Jennifer Sutton ("Sutton"), with Plaintiffs Erika L. Rivera and Luis J. Guzman (collectively "Plaintiffs") as passengers, was traveling northbound on Wamstad Road, just south of Parma, when Sutton's vehicle collided with a black bull owned by Defendant Dale W. Piercy ("Piercy").

The accident occurred in an area designated as a herd district by the Canyon County Commissioners on July 18, 1908. (Affidavit of Joshua S. Evett in Support of Defendant Sutton's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment ("Evett Aff."), ¶ 3.) The bull involved in the collision was pastured in a field east of Wamstad Road, north of the Boise River bridge and south of Parma upon land designated as a herd district in the Order of the Canyon County Commissioners dated December 10, 1982. (Evett Aff., ¶ 4.) Livestock in Canyon County are prohibited from running at large pursuant to Canyon County Ordinance 03-05-17, enacted June 4, 2004, Ordinance No. 04-009.

Rivera and Guzman filed a personal injury action against Piercy and Sutton. Rivera ultimately settled her claims. On or about May 1, 2007, Piercy filed a motion for summary

judgment seeking a judgment from the Court that the 1908 and 1982 herd district ordinances were void on the grounds that the ordinances did not comply with the requirements of Title 25, Chapter 24, Idaho Code. Piercy argued that if the 1908 and the 1982 herd district ordinances were invalid, the area where the bull was pastured, and the location where the accident occurred would be open range, and Piercy would be immune from liability for the accident pursuant to Idaho Code § 25-2118.

On or about October 9, 2007, the District Court entered its Order Denying Defendant Piercy's [sic] Motion for Summary Judgment, Joining Canyon County, and Holding all Other Motions in Abeyance Until the Herd District's Validity is Resolved ("Order Denying Defendant Piercy's Motion for Summary Judgment"). Therein, the District Court denied Piercy's motion for summary judgment on the validity of the herd district ordinances on the grounds that there existed genuine issues of material fact. (Order Denying Defendant Piercy's Motion for Summary Judgment at 23.) The Court further concluded that the validity of the herd districts was a legal issue that required resolution prior to litigating the damages issues. (*Id.* at 22.) To fully resolve the herd district issues, the Court further concluded that it was necessary to join Canyon County as a party. (*Id.* at 22-24.) The Court directed Sutton's counsel "to prepare and serve the necessary pleadings to join Canyon County...as a third-party defendant."¹ (*Id.* at 24.)

¹ Procedurally, joining Canyon County as a third-party defendant was not entirely proper. Idaho Rule of Civil Procedure 14(a) provides that a defendant may bring in a third-party "who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Canyon County was not, nor could it have been liable to Piercy or Sutton for Guzman's tort claim.

Pursuant to the Order Denying Defendant Piercy's Motion for Summary Judgment, on October 15, 2007, Sutton's counsel filed the Action for Declaratory Judgment, adding Canyon County as a defendant and requesting the Court to determine the validity of the herd district ordinances. The declaratory action was assigned the same case number as the personal injury action. On November 8, 2007, Canyon County filed its Answer of Third Party Defendant Canyon County, Idaho. The declaratory judgment action was scheduled for a two day bench trial commencing October 8, 2008.

On August 1, 2008, the Court issued its Order of Clarification, clarifying the Order Denying Defendant Piercy's Motion for Summary Judgment dated October 9, 2007. The Order of Clarification addressed whether Piercy would be able to argue the retroactive application of the July 1, 1983 amendment to Idaho Code § 25-2402(2), on the 1908 and 1982 herd districts. The Court concluded that Piercy could not "re-litigate the retroactive reach of the 1983 amendment to Idaho Code § 25-2402(2)." (Order of Clarification at 2.) The Court also indicated that, if relevant, it would "hear evidence on whether federal or state lands are included where the animal in question escaped or where the accident took place." (*Id.*)

The parties to the declaratory judgment action were not properly aligned²; therefore, the parties stipulated to a realignment. On or about September 11, 2008, counsel for Piercy filed an Amended Action for Declaratory Relief seeking a determination that the 1908 and 1982 herd district ordinances were invalid and naming Canyon County, Sutton and Guzman as defendants.

²Although Sutton's counsel filed the original declaratory judgment action by order of the trial court, it was actually Piercy that was seeking a determination from the court regarding the validity of the herd district.

Again, the declaratory judgment action was assigned the same case number. Shortly thereafter, Guzman, Sutton and Canyon County each filed an answer to the amended declaratory relief action.

The court trial on the declaratory judgment action occurred as scheduled on October 8, 2008. On January 21, 2009, the Court issued its Findings of Facts, Conclusions of Law and Judgment in Bifurcated Portion of Trial (“Declaratory Action Judgment”), holding the 1982 herd district ordinance invalid. Judge Petrie’s Declaratory Action Judgment represents a final judgment of all claims asserted in the declaratory judgment action. Judge Petrie has since retired, and the case was reassigned to this Court.

Piercy moves for summary judgment in the personal injury action based upon the Court’s decision in the declaratory judgment action. The Court should deny Piercy’s Second Motion for Summary Judgment on the grounds that (1) the accident occurred in the 1908 herd district, thus there is no immunity from liability; and (2) Piercy violated Canyon County ordinance 03-05-17, and is negligent per se. Further, Sutton’s Motion to Reconsider Judge Petrie’s decision in the declaratory judgment action, together with her supporting affidavit and memorandum, will be filed shortly hereafter.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). The burden is on the moving party to prove an absence of genuine issues of material fact. *Rouse v. Household*

DEFENDANT SUTTON’S MEMORANDUM IN OPPOSITION TO DEFENDANT PIERCY’S
SECOND MOTION FOR SUMMARY JUDGMENT– 5

Finance Corp., 144 Idaho 68, 170, 156 P.3d 569, 571 (2007), citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). For purposes of summary judgment, the evidence is construed liberally and all reasonable inferences are drawn in favor of the nonmoving party, and the moving party bears the burden of proving the absence of material fact issues. *Sherer v. Pocatello School Dist. # 25*, 143 Idaho 486, 489, 148 P.3d 1232, 1235 (2006), citing *Hei v. Holzer*, 139 Idaho 81, 84-85, 73 P.3d 94, 97-98 (2003).

Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party, who must then come forward with sufficient evidence to create a genuine issue of material fact. *Id.* A party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” *Sherer*, 143 Idaho at 489-490, 148 P.3d at 1235-1236; I.R.C.P. 56(e). Such evidence may consist of affidavits or depositions, but “the Court will consider only that material . . . which is based upon personal knowledge and which would be admissible at trial.” *Sherer*, 143 Idaho at 490, 148 P.3d at 1236, citing *Harris v. State, Dep’t of Health & Welfare*, 123 Idaho 295, 297-98, 847 P.2d 1156, 1158-59 (1992). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896-897, 155 P.3d 695, 697 -698 (2007), citing *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. *Id.* at 897, 155 P.3d at 698.

Statutory interpretation is a question of law. *Jones v. Crawford*, ___ Idaho ___, 205 P.3d 660, 664 (2009). When construing a statute, the words used must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole. *Id.* (citations omitted).

IV. LEGAL ANALYSIS

A. **PIERCY IS NOT IMMUNE FROM LIABILITY BECAUSE THE ACCIDENT OCCURRED IN A HERD DISTRICT ESTABLISHED IN 1908.**

Even assuming the bull escaped from an open range area, the accident occurred within the boundaries of the 1908 herd district, thus Piercy is not automatically immune from liability. Under the facts of this case, the Court's focus should be on where the accident occurred, not where the bull came from. Piercy improperly relies on Idaho Code § 25-2402(1) to support the proposition that Piercy is immune from liability for the accident that occurred in the 1908 herd district because Piercy's bull strayed from open range into the herd district, and the district was not enclosed by cattle guards to prevent livestock from straying across Wamstad Road and into the district as required by Idaho Code § 25-2402(1).

Idaho Code § 25-2402(1), in general, sets forth the requirements for establishing a herd district and what must be included in the herd district petition. Idaho Code § 25-2402(1) was originally enacted in 1907, and was subsequently amended in 1919, 1935, 1947, 1953, 1963, 1983, 1985, 1990 and 1996. The statute in its current form, and as relied on by Piercy, sets forth the mandatory petition language, in pertinent part:

Such petition shall...designate that the herd district shall not apply to nor cover livestock, excepting swine, which shall roam, drift or stray from open range into the district unless the district shall be inclosed by lawful fences and cattle guards *as needed* in roads penetrating the district so as to prevent livestock, excepting swine.

DEFENDANT SUTTON'S MEMORANDUM IN OPPOSITION TO DEFENDANT PIERCY'S
SECOND MOTION FOR SUMMARY JUDGMENT- 7

from roaming, drifting or straying from open range into the district...

I.C. § 25-2402(1) (emphasis added).

The underlined language, with the exception of “as needed,”³ was added by the 1963 amendments. (Evelt Aff., ¶ 5.) New legislation is not given retroactive effect “unless expressly so declared.” I.C. § 73-101. The Idaho Supreme Court held that “a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’” *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987)(citations omitted). In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied. *Id.* The 1963 legislation amending I.C. § 25-2402(1) did not provide for retroactive application. Since the statutory language has no retroactive effect, that specific herd district petition requirement is inapplicable to the 1908 herd district.

Additionally, Idaho Code § 25-2401(1) expressly states, in pertinent part: “[t]he provisions of this chapter shall not apply to any herd district or herd ordinance in full force and effect prior to January 1, 1990, but shall apply to any modification thereof.” By its own terms, the herd district laws do not apply to the 1908 herd district, which was in full force in effect prior to January 1, 1990.

At the time the 1908 herd district was established, the 1907 version of Idaho Code § 25-2402 applied, which provided:

A majority of the qualified electors of any district, which district may include one or more voting precincts or parts of one or more voting precincts, may petition the board of county commissioners

³ The “as needed” language was introduced in the 1990 amendments. (Evelt Aff., ¶ 6.)

in writing to create such district a "herd district." Such petition shall describe the boundaries of the said proposed herd district, and shall designate what animals of the species of horses, mules, asses, cattle, swine, sheep and goats it is desired to prohibit from running at large in such district; and may designate the period of the year during which it is desired to prohibit such animals from running at large.

1907 Idaho Sess. Laws 71; see Evett Aff., ¶ 7.

When the 1908 herd district was created, there was no requirement that the petition creating the herd district contain language designating that the herd district would not apply to cattle straying from open range into the district unless the herd district was enclosed by lawful fences and cattle guards to prevent livestock from straying into the district, thus Piercy cannot rely on such petition requirement to create immunity for the accident. Additionally, no statute enacted since the creation of the 1908 herd district has required the installation of cattle guards between post-1963 and pre-1963 herd districts.

Further, the Idaho Supreme Court case relied upon by Piercy in support of his argument is distinguishable and is not applicable to the facts of this case. See, *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986). In *Easley*, the Supreme Court of Idaho addressed a question of law of first impression: when open range land and a herd district meet at a common border between two landowners, which owner, if either, is required to construct a legal fence. *Id.* at 117, 721 P.2d at 217. Under the facts of that case, until 1975 both the Easleys' land and the Lees' land was open range. *Id.* at 116, 721 P.2d at 216. In 1975, the Easleys' initiated steps to form a herd district. *Id.* The 1963 version of Idaho Code § 25-2402(1) applied, requiring the petition to contain the statutory language designating that the herd district shall not apply to cattle roaming into the

DEFENDANT SUTTON'S MEMORANDUM IN OPPOSITION TO DEFENDANT PIERCY'S
SECOND MOTION FOR SUMMARY JUDGMENT- 9

district from open range unless the district is inclosed by lawful fences and cattle guards. *Id.* at 118, 721 P.2d at 218. That mandatory language was deleted by the county commissioners at the Easleys' request. *Id.* at 116, 721 P.2d at 216. The court first concluded that the statutorily required language could not be removed by modification of the county commissioners. *Id.* at 118, 721 P.2d at 218. The court then held that the 1963 legislative language evidenced the legislative intent to exclude liability for livestock roaming into a herd district from open range unless the district was properly enclosed. *Id.* Finally, the court held "that a herd district, and the liabilities resulting from the formation of a herd district, do not apply to livestock, excepting swine, that roam, drift or stray from open range into the herd district, unless the herd district is inclosed by lawful fences and cattle guards in roads penetrating the district." *Id.* Thus, the boundaries of the herd district must be fenced to "fence-out" open range cattle.

The Easleys' established their herd district in 1975, and the 1963 amendments to Idaho Code § 25-2402(1) clearly applied to the creation of that herd district. The *Easley* court did not address the effect of the 1963 amendments on a herd district created prior to the effective date of those amendments. Therefore, the *Easley* case does not affect the argument that the 1963 amendments do not have retroactive application, and therefore, do not apply to the 1908 herd district.

Based on the foregoing, the 1908 herd district was not required to place cattle guards on Wamstad Road to prevent livestock from straying from open range into the district. Only post-1963 herd districts that border open range areas are required to do so. Therefore, as a matter of law, Piercy is not immune from liability under Idaho Code § 25-2402(1).

DEFENDANT SUTTON'S MEMORANDUM IN OPPOSITION TO DEFENDANT PIERCY'S
SECOND MOTION FOR SUMMARY JUDGMENT- 10

Since the accident occurred in the 1908 herd district, and not open range, Idaho Code § 25-2118 does not apply. *See Adamson v. Blanchard*, 133 Idaho 602, 607, 990 P.2d 1213, 1218 (1999). Instead, the Court must analyze this case under Idaho Code § 25-2119, which states: “[n]o person owning, or controlling the possession of, any domestic animal lawfully on any highway, shall be deemed guilty of negligence by reason thereof.” (Emphasis added). I.C. § 25-2119. “Lawfully” has not been defined; however, it has been interpreted to mean when animals are on the roadway during the day while attended or driven or trailed down the road. *Adamson*, 133 Idaho at 608, 990 P.2d at 1219. On the other hand, an inference exists that an animal owner is negligent “in cases of nighttime vehicle collisions with unattended domestic animals running at large” on the roadway. *Griffith v. Schmidt*, 110 Idaho 235, 239, 715 P.2d 905, 909 (1985). Such animals are not “lawfully” on the roadway.

As a matter of law, Piercy is not immune from liability under Idaho Code § 25-2119. *See Adamson v. Blanchard*, 133 Idaho 602, 990 P.2d 1213, (1999). The facts are undisputed. The bull that caused the accident was running on the roadway at night unattended. Piercy was not driving his bull down the highway at the time of the accident. Based on the foregoing, Idaho Code § 25-2119 fails to provide Piercy immunity from negligence liability.

B. PIERCY’S BULL WAS RUNNING AT LARGE IN VIOLATION OF CANYON COUNTY CODE 03-05-17, AND THEREFORE, PIERCY IS NEGLIGENT PER SE.

Canyon County Code § 03-05-17 prohibits animals from running at large and states in pertinent part:

DEFENDANT SUTTON’S MEMORANDUM IN OPPOSITION TO DEFENDANT PIERCY’S
SECOND MOTION FOR SUMMARY JUDGMENT– 11

03-05-17 RUNNING AT LARGE PROHIBITED:

(2) Livestock:

A. Prohibited: It shall be unlawful for any person to allow livestock which he owns, keeps or harbors to be at large upon the roads, streets or alleys of the county or upon any premises other than his own.

...

(4) Animals At Large: It shall be unlawful for any animal(s) (except felines, domestic or feral), owned or possessed by an individual to be at large upon the roads, streets or alleys of the county or any public place of the county or upon any premises other than his own...

The ordinance regulates animals running at large in both herd districts and open range areas. The ordinance is a valid exercise of Canyon County's police power, and is enforceable.

The Idaho Supreme Court has held that "in the absence of a state legislative enactment clearly indicating that livestock must be free to roam the lands of Idaho uninhibited by the ownership or character of the lands, counties and municipalities may validly exercise their police powers to prohibit such free roaming livestock." *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 105 Idaho 209, 214, 668 P.2d 85, 90 (1983). In *Benewah County*, a cattlemen's association sought declaratory and injunctive relief against enforcement by the board of county commissioners of an ordinance prohibiting livestock from running at large in open range areas. *Id.* at 209, 668 P.2d at 85. The county passed an ordinance in 1977 to prohibit livestock from running at large. *Id.* at 211, 668 P.2d at 87. The court concluded that the purpose and effect of the ordinance was different from the purpose and effect

of the herd district statutes.⁴ *Id.* at 214, 668 P.2d at 90. Ultimately, the *Benewah* court held that the ordinance was a valid exercise of the county's police power. *Id.* at 214, 668 P.2d at 90.

Canyon County validly exercised its police power in enacting Canyon County ordinance 03-05-17 prohibiting livestock from running at large. As a matter of law, Piercy violated the County ordinance by allowing his bull to run at large and is therefore, negligent per se.

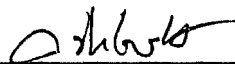
V. CONCLUSION

Defendant Sutton respectfully requests the Court deny Piercy's Second Motion for Summary Judgment on the grounds that as a matter of law Piercy was not immune from liability under Idaho Code §§ 25-2402(1) and 25-2118, and that Piercy is negligent per se pursuant to his violation of Canyon County ordinance 03-05-17.

DATED this 21st day of May, 2009.

ELAM & BURKE, P.A.

By: _____



Joshua S. Evett, of the firm
Attorneys for Defendant

⁴The court did not analyze whether the ordinance conflicted with Idaho Code § 25-2119, however, the ordinance imposes criminal liability while Idaho Code § 25-2119 addresses immunity for negligence. Therefore, the two statutes do not conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May 2009, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton
Chasan & Walton, LLC
P.O. Box 1069
Boise, ID 83701-1069

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile

Stephen E. Blackburn
Blackburn Law, P.C.
660 East Franklin Road, Suite 220
Meridian, ID 83642

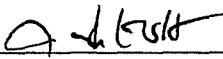
☐ U.S. Mail
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Ryan B. Peck
Saetrum Law Offices
P.O. Box 7425
Boise, ID 83707

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☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile

John T. Bujak
Carlton R. Ericson
Canyon County Prosecutor
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

☐ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile



Joshua S. Evett

Joshua S. Evett ISB #5587
Meghan E. Sullivan ISB #7038
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
jse@elamburke.com
mes@elamburke.com

F I L E D
A.M. 9:10 P.M.

JUL 30 2009

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Attorneys for Defendant Jennifer Sutton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually)	
)	Case No. CV05-4848
Plaintiff,)	
)	DEFENDANT JENNIFER SUTTON'S
v.)	MOTION FOR RECONSIDERATION
)	
DALE PIERCY, individually and)	
JENNIFER SUTTON, individually,)	
)	
Defendants.)	
<hr/>		
DALE PIERCY, individually,)	
)	
Plaintiff,)	
)	
CANYON COUNTY, LUIS GUZMAN,)	
individually and JENNIFER SUTTON,)	
individually,)	
)	
Defendants.)	
<hr/>		

COMES NOW Defendant Jennifer Sutton ("Sutton"), by and through her attorneys of
record, Elam & Burke, P.A., and pursuant to Rule 11(a)(2)(B) of the Idaho Rules of Civil

DEFENDANT JENNIFER SUTTON'S MOTION FOR RECONSIDERATION- 1

Procedure, hereby moves this Court to reconsider the Order on Motion to Reconsider dated April 30, 2009, and the Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial, dated January 21, 2009, on the grounds and for the reasons that the same are contrary to law and the facts of this case as set forth more fully in Sutton's Memorandum in Support of Motion to Reconsider, filed concurrently herewith.

This motion is made and based upon the files and records in this action, together with the Memorandum in Support of Defendant Jennifer Sutton's Motion for Reconsideration and the Affidavit of Joshua S. Evett filed concurrently herewith.

ORAL ARGUMENT IS REQUESTED.

DATED this 30th day of July 2009.

ELAM & BURKE, P.A.

By: Joshua S. Evett
Joshua S. Evett, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July 2009, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton
Chasan & Walton, LLC
P.O. Box 1069
Boise, ID 83701-1069

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Stephen E. Blackburn
Blackburn Law, P.C.
660 East Franklin Road, Suite 220
Meridian, ID 83642

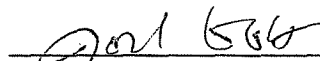
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Ryan B. Peck
Saetrum Law Offices
P.O. Box 7425
Boise, ID 83707

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John T. Bujak
Carlton R. Ericson
Canyon County Prosecutor
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

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☐ Overnight Mail
☐ Facsimile



Joshua S. Evett

Joshua S. Evett ISB #5587
Meghan E. Sullivan ISB #7038
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Telephone: (208) 343-5454
Facsimile: (208) 384-5844
jse@elamburke.com
mes@elamburke.com

F I L E D
A.M. 2:10 P.M.

JUL 30 2009

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Attorneys for Defendant Jennifer Sutton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually)
Plaintiff,)

v.)

DALE PIERCY, individually and)
JENNIFER SUTTON, individually,)
Defendants.)

DALE PIERCY, individually,)
Plaintiff,)

CANYON COUNTY, LUIS GUZMAN,)
individually and JENNIFER SUTTON,)
individually,)
Defendants.)

Case No. CV05-4848

AFFIDAVIT OF JOSHUA S. EVETT IN
SUPPORT OF DEFENDANT SUTTON'S
MOTION FOR RECONSIDERATION

AFFIDAVIT OF JOSHUA S. EVETT IN SUPPORT OF DEFENDANT
SUTTON'S MOTION FOR RECONSIDERATION- 1

STATE OF IDAHO)
) ss.
County of Ada)

Joshua S. Evett, having first been duly sworn, upon his oath deposes and says as follows:

1. I am over the age of 18 years and make this affidavit of my own personal knowledge. I am one of the attorneys for Defendant Jennifer Sutton (“Defendant”) in the above-captioned case.

2. I make this affidavit based on knowledge of the facts in this case, and in support of the Defendant Jennifer Sutton’s Motion for Reconsideration, filed concurrently herewith.

3. Attached hereto as Exhibit A is a true and correct copy of the Order of the Canyon County Commissioner’s dated July 18, 1908, designating the area where the accident occurred as a herd district.

4. Attached hereto as Exhibit B is a true and correct copy of the December 10, 1982, Order Establishing Herd District issued by the Board of the Canyon County Commissioners.

5. Attached hereto as Exhibit C are true and correct copies of excerpts from the Bench Trial, dated October 8, 2008 (“Trial Transcript”), before the Honorable Gordon W. Petrie: 113:7-114:6, 167:5-168:1, and 116:10-12.

6. Attached hereto as Exhibit D is a true and correct copy of the December 2, 1982, resolution of the Board of the Canyon County Commissioners establishing the 1982 herd district.

7. Attached hereto as Exhibit E is a true and correct copy of the notice published in the Idaho Press Tribune on December 20, 1982.

AFFIDAVIT OF JOSHUA S. EVETT IN SUPPORT OF DEFENDANT
SUTTON’S MOTION FOR RECONSIDERATION– 2

8. Attached hereto as Exhibit F are true and correct copies of excerpts from the deposition of E.G. Johnson ("Johnson Depo."), dated October 6, 2008: 15:14-15, *see also* 15:4-16:5.

9. Attached hereto as Exhibit G are true and correct copies of excerpts from the deposition of Dale W. Piercy ("Piercy Depo."), dated May 10, 2006: 5:16-23, 41:4-7 and 44:17-45:4.

10. Attached hereto as Exhibit H is a true and correct copy of the herd district map obtained from Canyon County.

11. Attached hereto as Exhibit I are true and correct copies of excerpts from the deposition of Monica Reeves ("Reeves Depo."), dated July 7, 2008: 16:16-17:3.

12. Attached hereto as Exhibit J are true and correct copies of excerpts from the deposition of Glen Koch ("Koch Depo."), dated August 25, 2008: 19:23-20:10, 20:11-17, 21:18-22:1, 23:6-10, 25:12-20, 26:2-25, 27:14-22, 28:10-22, 33:5-14, 33:15-34:4, *see also*, 36:5-16.

13. Attached hereto as Exhibit K are true and correct copies of excerpts from the deposition of Bill A. Staker ("Staker Depo."), September 22, 2008: 14:22-15:6, 15:12-16, 17:11-16, 18:6-19:17, 20:6-21:8 and 23:11-23.

DATED this 30th day of July 2009

Joshua S. Evett

Joshua S. Evett

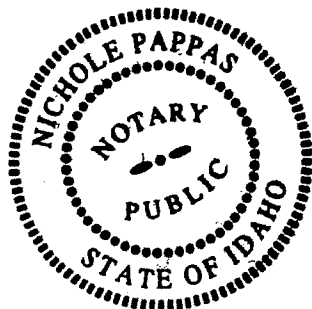
SUBSCRIBED AND SWORN to before me this 30 day of July 2009.

Nichole Pappas

Notary Public for Idaho

Residing at Meridian

Commission expires: 01-10-2012



AFFIDAVIT OF JOSHUA S. EVETT IN SUPPORT OF DEFENDANT
SUTTON'S MOTION FOR RECONSIDERATION- 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of July 2009, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton
Chasan & Walton, LLC
P.O. Box 1069
Boise, ID 83701-1069

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Stephen E. Blackburn
Blackburn Law, P.C.
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Ryan B. Peck
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John T. Bujak
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Canyon County Deputy Prosecutor
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

☐ U.S. Mail
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☐ Overnight Mail
☐ Facsimile

Joshua S. Evett
Joshua S. Evett

AFFIDAVIT OF JOSHUA S. EVETT IN SUPPORT OF DEFENDANT
SUTTON'S MOTION FOR RECONSIDERATION- 5

Idaho, July 18, 1908.

Sixth Day of July 1908

The Board of County Commissioners of Blaine County, Idaho, do hereby adjournment. Present, W.M. Platt, Chairman, J.C. Brown, J.B. Brown, and J.B. Brown, Clerk, when the following proceedings were had, to-wit:

IN THE MATTER OF THE PETITION OF A.W. MOODY et al praying for the establishment of a herd district, this being the day and the hour set for the hearing of said petition, the same came on regularly for a hearing. It appearing to this Board by documentary evidence and the evidence of witnesses that a majority of the electors of said proposed herd district are in favor of the enforcement of the herd law therein, and it appearing by affidavit on file herein that the notices of hearing were duly posted and published as required by law, the same is hereby granted according to law and shall take effect beginning August 20th, 1908. Said district is described as follows: Beginning at a point in the middle of the channel of Boise River where the section line running north and south between sections one and two, eleven and twelve township 4 north, range 4 east N.R. crosses said river, thence due south to the southwest corner of Sec. 39, Tp. 4 N.R. 4 W.B.M., thence due east two miles to the N.E. Cor. of Section 6, Tp. 3 N.R. 3 W.B.M. thence due south to the middle of the main channel of the Snake River, thence in a northwesterly direction, along the middle of the main channel of the said river, a point on the line between Idaho and Oregon where the State line crosses said river, thence due north to the point where the Section line running north and south between sections 22 and 23, 26 and 27, Tp. 5 N.R. 6 W.B.M. crosses or intersects said Snake River, thence in a northerly direction to a point in the main channel of the Boise River, thence in a southeasterly direction along the middle of the north channel of the Boise River to a point where it intersects with the south channel at the east end of what is commonly known as the McConnell Island, thence in a southeasterly direction along the main channel of said river, to the place of damming, and the following described animals are prohibited from running at large during each and every year hereafter: horses, mules, asses, cattle, swine, sheep and goats.

IN THE MATTER OF THE PETITION OF A.W. MOODY et al praying for the establishment of a herd district in Middleton, the same is denied for the reason the petitioners have not complied with the law in furnishing an affidavit showing that a majority of the electors of said proposed precinct had signed the petition.

Resub #2 IN THE MATTER OF THE PETITION OF L. WACHTER et al praying for the establishment of a herd district, this being the day and the hour set for the hearing of said petition, the same came regularly on for a hearing. It appearing to this board by documentary evidence and the evidence of witnesses that a majority of the electors of said proposed herd district are in favor of the enforcement of the herd law therein, and it appearing by affidavit on file herein that the notices of hearing were duly posted and published as required by law, the same appearing to comply to law the same is granted and shall take effect August 20th 1908. Said district is described as follows: All of Poed District No. 9 and 29, and all of Poed District No. 10, except that portion lying west of the right of way of the Oregon Short Line Railroad, and the following described animals are prohibited from running at large, during each and every year hereafter: horses, mules, asses, cattle, swine, sheep and goats.

IN THE MATTER OF THE NEW PLYMOUTH LAND & COLONIZATION CO. assessment for the year 1908, it appearing to this board that the said assessment is too low in respect to the real estate of said company situated at New Plymouth, Idaho. It is hereby ordered that Brainard, Secretary of said Company be notified to appear before this Board on Monday the 27th day of July at 10 o'clock A.M. to show cause why the assessment of said Company should not be raised.

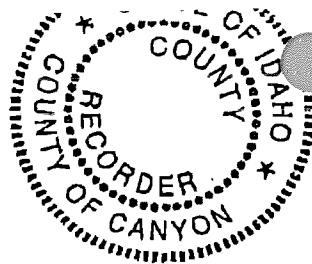
Whereupon this board adjourned until Monday, July 20, 1908, at 2 o'clock P.M.

W.M. Platt

Chairman.

W.T. Badley

Clerk.



ORDER ESTABLISHING HERD DISTRICT

State of Idaho }
 County of Canyon }
 (hereby certify that the foregoing instrument is
 a true and correct copy of the original as the
 same appears in this office.)
 DATED 1-16-08
 William H. Hurst, Clerk of the District Court
 and Ex Officio Recorder
 by [Signature] Deputy

The Board has again reviewed the complexity of the Herd District Boundaries throughout the County and has determined, by resolution, that the time has come to simplify and unify the status of Herd Districts in Canyon County. In making this determination the Board has found the following:

1. A survey map attached hereto, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.
2. That map shows that over 95% of the land within the County is now in Herd District status.
3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.

Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.

5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County. Therefore,

IT IS HEREBY ORDERED by the Board of Canyon County Commissioners on this 12 day of December, 1982, that a Herd District be established in the three remaining open range areas in Canyon County as shown on the attached survey map (marked in black), to the end that the entire land area of Canyon County be placed in Herd District status.

[Signature: Carlos E. Bledsoe]
 Carlos Bledsoe
 Chairman

[Signature: Del Hobza]
 Del Hobza
 Member

[Signature: Glenn D. Koch]
 Glenn D. Koch
 Member

EXHIBIT B

ATTEST: [Signature: Bill A. Staller]
 Clerk/Deputy

EST
 HERD ORD 45

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CV05-4848
)	
DALE PIERCY, individually,)	
and JENNIFER SUTTON,)	
individually,)	
)	
Defendants.)	
<hr/>		
DALE PIERCY, individually,)	
)	
Plaintiff,)	
)	
vs.)	
)	
CANYON COUNTY, LUIS GUZMAN,)	
individually and JENNIFER)	
SUTTON, individually,)	
)	
Defendants.)	
<hr/>		

BENCH TRIAL

October 8, 2008

BEFORE THE HONORABLE GORDON W. PETRIE

REPORTED BY:
YVONNE L. HYDE GIER, C.S.R. #73, R.P.R.

1 **MR. SAETRUM: I apologize.**
2 **THE COURT: And it doesn't take much. The**
3 **witness is being handed joint 2.**

4 Q. BY MR. SAETRUM: Mr. Piercy, do you recognize
5 that general area represented on the Exhibit 2?

6 A. Yes.

7 Q. The field from which the bull escaped, where is
8 that located at?

9 A. **It is on Longstead Road, it would be north of**
10 **Boise River, and east next to the bridge.**

11 Q. Can you find that area on that map?

12 A. Yes.

13 Q. Would you show that area to the judge, please?

14 THE COURT: This is what I am going to have you
15 do. I am going to have you put this little sticky above
16 it. And then on the sticky, I am going to have you
17 write an arrow that stops at about the location, just
18 for my reference.

19 THE WITNESS: Okay.

20 THE COURT: No. Put the actual sticky portion,
21 use it up-side down, because I want the arrow coming
22 from down above.

23 THE WITNESS: (Witness complied.)

24 THE COURT: Now, hold that up so everyone else
25 can see, please.

113

1 MR. SAARI: Can I see, sir?

2 THE WITNESS: (Witness complied.)

3 MR. SAETRUM: Mr. Piercy, thank you. That's all
4 the questions I have for you.

5 THE WITNESS: Thank you.

6 THE COURT: All right. Mr. Saari?

7 CROSS-EXAMINATION

8 QUESTIONS BY MR. SAARI:

9 Q. Sir, with regard to joint Exhibit 2, the map that
10 you just marked, it is true, is it not, that there are
11 cattle on both sides of the Boise River off of Longstead
12 Road?

13 A. **You have to be more specific --**

14 MR. SAETRUM: Wait, wait. Could counsel provide
15 a time frame? This is very vague. Are we talking 1982,
16 or are we talking now?

17 THE COURT: All right. Please rephrase.

18 MR. SAARI: Yes.

19 Q. BY MR. SAARI: With regard to -- in 1982, on
20 December 20th, 1982, at that particular time, you did
21 not own the property at which you live at now; is that
22 correct?

23 A. **That's correct.**

24 Q. And the bull you are talking about is in a
25

114

1 pasture you control on some property you have owned for
2 how long?

3 A. **Give or take a year in '94.**

4 Q. At the time when the incident occurred involving
5 the bull and involving the car - and involving the
6 reason why we are here today - at that particular time,
7 I believe it was 2005, at that particular time, my
8 question is, you spoke of your bull being pastured on
9 the north side of the Boise River off of Longstead Road,
10 my question is, were there also cattle that were on the
11 south side of the Boise River on Longstead Road right by
12 the bridge?

13 A. **On the south side, east, west?**

14 Q. It would be west, sir.

15 MR. SAETRUM: Your Honor, I am going to object
16 that it is vague. Are we talking about cattle owned by
17 anybody or cattle owned by Mr. Piercy?

18 THE COURT: Well, I don't know. I'm not sure it
19 makes a difference for him to answer. Do you know
20 whether or not there was?

21 Q. BY MR. SAARI: I will follow up with this, sir.
22 With regard to Longstead Road where it crosses the Boise
23 River, at the time this incident occurred in 2005, was
24 that bull pastured off of Longstead Road, south of the
25 Boise River, west of Longstead Road?

115

1 THE COURT: You are talking about the bull in
2 question?

3 MR. SAARI: The bull in question.

4 THE WITNESS: No.

5 MR. SAARI: I have no further questions.

6 THE COURT: Mr. Walton.

7 CROSS-EXAMINATION

8 QUESTIONS BY MR. WALTON:

9 Q. You have been a rancher, Mr. Piercy, in Canyon
10 County for over 30 years; right?

11 A. **Correct.**

12 Q. You have been listed as an expert witness on
13 ranching in this litigation, haven't you?

14 A. **I do not know.**

15 THE COURT: Apparently he is just finding out
16 now.

17 MR. WALTON: May I approach?

18 THE COURT: Sure.

19 Q. BY MR. WALTON: I'm showing you, these are
20 discovery responses, Mr. Piercy, filed by your counsel
21 in the personal injury case. I am going to show you
22 that discovery response.

23 It says, Dale Piercy is an expert in the areas of
24 farming and ranching in Canyon County, Idaho.
25

116

1 reflect that the two discussed that there was no open
2 range where the accident occurred.

3 Mr. Piercy testified today that the accident
4 occurred in the white area.

5 Mr. Piercy has alleged in this suit that he never
6 knew that that was herd district.

7 That is not true if he and Mr. Axis had the
8 discussion in 2001 that is documented in the insurance
9 company's notes.

10 Moreover, the record will reflect if we take
11 Mr. Axis's deposition that Mr. Piercy was paid money by
12 his insurance company for his cattle, and that his
13 insurance company paid for the damage to the vehicles.

14 If it was open range, Mr. Piercy's cattle would
15 have been covered by the automobile insurers, and the
16 automobile insurers would have had to pay for the
17 damages to the automobiles, the point simply being that
18 Mr. Piercy did take a stance that it was herd district.
19 He accepted, I want to say a thousand dollars or more,
20 between a thousand and 2000 from his insurance company
21 because it was herd district.

22 THE COURT: Whether he accepts it from his herd
23 district -- or his insurance company or someone else's
24 insurance company, isn't the result the same?

25 MR. WALTON: No, because he acknowledged the

165

1 existence of the herd district by taking the money from
2 his insurance company. He has accepted the existence of
3 the herd district. He had a conversation in which it
4 was acknowledged that there was no open range.

5 MR. SAETRUM: Your Honor, may I be heard on that
6 issue?

7 THE COURT: Sure.

8 MR. SAETRUM: When a person buys livestock
9 coverage, it is a Section 1 coverage. It is just like
10 buying coverage on your bicycle if it got stolen. Your
11 insurance company - if someone destroys your bicycle -
12 will pay you for the loss of your bicycle. They will
13 pay you for the loss of your animal if your animal is
14 killed through an accident. It is a Section 1 coverage.
15 It has nothing to do with anything as to where the
16 animal was at the time. It is a matter of whether or
17 not it was killed in an accident. So that is irrelevant
18 to the discussion.

19 But what Mr. Axis would say, counsel, and I
20 realize you said this the first time, but then you
21 changed your language, that you determined it was not
22 open range. There is nothing in his report saying it is
23 a herd district. It is not open range. And the Adams
24 case came out - I was wrong - it came out in January of
25 last year.

166

1 And so if an animal escaped from a fenced area,
2 then it was closed range. It was not open range,
3 and the insurance company would have paid because of
4 that.

5 THE COURT: See, the dynamic changed, the rules
6 changed, and I think that changes the defense even if I
7 could get to the point where taking two-grand is
8 unconscionable, because this is not open range.

9 First of all, it requires this court to make the
10 leap - and maybe the evidence shows, I don't know - that
11 Mr. Piercy knows the difference and would believe but
12 for the type of coverage he had that if this were -- if
13 this were open range, I don't get paid.

14 So that's a long way of saying, I can't imagine
15 putting every negative inference I can on a settlement
16 that Mr. Piercy accepted in 2001, that that rises to the
17 level of estoppel or laches. I just don't find the kind
18 of thing that was going on in the other cases that the
19 court discussed; particularly, since we had that hybrid
20 closed range versus open range versus herd district
21 business going on during that period of time.

22 So, Mr. Evett, I see this as essentially a
23 similar issue, whether or not there was a herd district,
24 a valid herd district at the time of the accident.

25 So if it's a motion to try the other part -

167

1 denied. Anything else?

2 MR. SAETRUM: Your Honor, we have just a short
3 rebuttal witness.

4 THE COURT: The witness is short?

5 MR. SAETRUM: We have a very attractive rebuttal
6 witness, Your Honor.

7 THE COURT: You do?

8 MR. SAETRUM: Yes.

9 THE COURT: All right.

10 MR. WALTON: If I may?

11 THE COURT: Sure.

12 MR. WALTON: In talking with Mr. Bruse outside
13 the room, he feels strongly that the court ought to hear
14 some evidence about a herd district created in '08 that
15 might include the whole county.

16 THE COURT: Did you say "might"?

17 MR. WALTON: Yes.

18 THE COURT: In '08?

19 MR. WALTON: 1908.

20 THE COURT: I was going to say 2008.

21 MR. WALTON: And I debate whether to do this, but
22 I think, candidly, if what we are searching for is the
23 truth, it ought to be heard, and so I would request
24 permission to re-open and put him on for brief testimony
25 on that topic.

168

MR. SAETRUM: I apologize.

THE COURT: And it doesn't take much. The witness is being handed joint 2.

Q. BY MR. SAETRUM: Mr. Piercy, do you recognize that general area represented on the Exhibit 2?

A. Yes.

Q. The field from which the bull escaped, where is that located at?

A. It is on Longstead Road, it would be north of Boise River, and east next to the bridge.

Q. Can you find that area on that map?

A. Yes.

Q. Would you show that area to the judge, please?

THE COURT: This is what I am going to have you do. I am going to have you put this little sticky above it. And then on the sticky, I am going to have you write an arrow that stops at about the location, just for my reference.

THE WITNESS: Okay.

THE COURT: No. Put the actual sticky portion, use it up side down, because I want the arrow coming from down above.

THE WITNESS: (Witness complied.)

THE COURT: Now, hold that up so everyone else can see, please.

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MR. SAARI: Can I see, sir?

THE WITNESS: (Witness complied.)

MR. SAETRUM: Mr. Piercy, thank you. That's all the questions I have for you.

THE WITNESS: Thank you.

THE COURT: All right. Mr. Saari?

CROSS-EXAMINATION

QUESTIONS BY MR. SAARI:

Q. Sir, with regard to joint Exhibit 2, the map that you just marked, it is true, is it not, that there are cattle on both sides of the Boise River off of Longstead Road?

A. You have to be more specific --

MR. SAETRUM: Wait, wait. Could counsel provide a time frame? This is very vague. Are we talking 1982, or are we talking now?

THE COURT: All right. Please rephrase.

MR. SAARI: Yes.

Q. BY MR. SAARI: With regard to -- in 1982, on December 20th, 1982, at that particular time, you did not own the property at which you live at now; is that correct?

A. That's correct.

Q. And the bull you are talking about is in a

114

1 pasture you control on some property you have owned for how long?

A. Give or take a year in '94.

Q. At the time when the incident occurred involving the bull and involving the car - and involving the reason why we are here today - at that particular time, I believe it was 2005, at that particular time, my question is, you spoke of your bull being pastured on the north side of the Boise River off of Longstead Road, my question is, were there also cattle that were on the south side of the Boise River on Longstead Road right by the bridge?

A. On the south side, east, west?

Q. It would be west, sir.

MR. SAETRUM: Your Honor, I am going to object that it is vague. Are we talking about cattle owned by anybody or cattle owned by Mr. Piercy?

THE COURT: Well, I don't know. I'm not sure it makes a difference for him to answer. Do you know whether or not there was?

Q. BY MR. SAARI: I will follow up with this, sir. With regard to Longstead Road where it crosses the Boise River, at the time this incident occurred in 2005, was that bull pastured off of Longstead Road, south of the Boise River, west of Longstead Road?

115

THE COURT: You are talking about the bull in question?

MR. SAARI: The bull in question.

THE WITNESS: No.

MR. SAARI: I have no further questions.

THE COURT: Mr. Walton.

CROSS-EXAMINATION

QUESTIONS BY MR. WALTON:

Q. You have been a rancher, Mr. Piercy, in Canyon County for over 30 years; right?

A. Correct.

Q. You have been listed as an expert witness on ranching in this litigation, haven't you?

A. I do not know.

THE COURT: Apparently he is just finding out now.

MR. WALTON: May I approach?

THE COURT: Sure.

Q. BY MR. WALTON: I'm showing you, these are discovery responses, Mr. Piercy, filed by your counsel in the personal injury case. I am going to show you that discovery response.

It says, Dale Piercy is an expert in the areas of farming and ranching in Canyon County, Idaho.

116

SEVENTEENTH DAY OF NOVEMBER TERM, A.D., 1982
CALDWELL, IDAHO DECEMBER 2, 1982

CERTIFICATE OF RESIDENCY APPROVED

The Board of Commissioners approved a Certificate of Residency for Marcedalin Torres to receive tuition aid to attend College of Southern Idaho.

RESOLUTION PASSED REGARDING HERD DISTRICTS IN CANYON COUNTY

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 2nd day of December, 1982: Upon motion of Commissioner Hobza and the second by Commissioner Bledsoe the Board resolves as follows: That because of the confusion that exists due to the over-lapping lines of herd districts and open range and because over ninety-five (95%) percent of the area of Canyon County is already designated a herd district the Board will issue an order designating all of Canyon County to be herd district as of December 14, 1982. Motion Carried Unanimously.

BEER AND WINE LICENSE APPROVED

The Board of Commissioners granted a retail license to Intermountain Food Stores, Inc. dba M&W Market #11, 120 Holly, Nampa, Idaho to sell beer and wine.

BEER LICENSE APPROVED

The Board of Commissioners granted a retail license to John L. O'Very dba El Charro Mini Mart, 1701 1st Street North, Nampa, Idaho to sell beer.

Commissioners' Proceedings

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,)	
Plaintiff,)	
)	
vs.)	Case No. CV05-4848
)	
DALE PIERCY, individually, and)	
JENNIFER SUTTON, individually,)	
Defendants.)	
)	
CANYON COUNTY)	
Third Party Defendant.)	
)	

DEPOSITION OF E.G. JOHNSON

OCTOBER 6, 2008

REPORTED BY:

MARLENE "MOLLY" WARD, CSR No. 704, RPR

Notary Public

EXHIBIT F

1 changed there?

2 A. Relative to?

3 Q. Whether or not it was open range?

4 A. Yeah. Yeah. I've been aware and I
5 don't remember exactly when, but I've been aware
6 that the -- with the open range status was
7 removed and it was a herd district.

8 Q. Do you recall any specific time frame
9 when you became aware of that?

10 A. Well, you know, it was some time after
11 we moved there. I know in my deposition here it
12 says '82 and '83. I'm not positive that that
~~13 time window fits with within when I knew that,~~
14 you know. But I've been aware of it for at least
15 the last 12 to 15 years that it's been -- it was
~~16 a herd district, we were no longer in open range~~
17 status, so ...

18 Q. And in --

19 MR. WALTON: You said "in my
20 deposition;" you meant "in my affidavit"?

21 THE WITNESS: Or yeah.

22 MR. PECK: Yeah.

23 THE WITNESS: The affidavit, I mean.

24 MR. PECK: Let's describe it --

25 MR. WALTON: Got you.

1 changed there?

2 A. Relative to?

~~3 Q. Whether or not it was open range?~~

4 A. Yeah. Yeah. I've been aware and I
5 don't remember exactly when, but I've been aware
6 that the -- with the open range status was
7 removed and it was a herd district.

8 Q. Do you recall any specific time frame
9 when you became aware of that?

10 A. Well, you know, it was some time after
11 we moved there. I know in my deposition here it
12 says '82 and '83. I'm not positive that that
13 time window fits with -- within when I knew that,
14 you know. But I've been aware of it for at least
15 the last 12 to 15 years that it's been -- it was
16 a herd district; we were no longer in open range
17 status, so ...

18 Q. And in --

19 MR. WALTON: You said "in my
20 deposition;" you meant "in my affidavit"?

21 THE WITNESS: Or yeah.

22 MR. PECK: Yeah.

23 THE WITNESS: The affidavit, I mean.

24 MR. PECK: Let's describe it --

25 MR. WALTON: Got you.

1 MR. PECK: -- describe it specifically.

2 THE WITNESS: I hadn't looked at that
3 until this morning and when I re-read that, I'm
4 not -- you know, I'm not sure that window fits,
5 is what I'm saying, is when I became aware of it.

6 ~~Q. (BY MR. PECK) And that's that was~~
7 Exhibit No. 1, right, your affidavit?

8 A. Yeah, that's correct.

9 Q. Okay. Do you recall how it was you
10 came to be aware of this change?

11 A. No, I don't. You know, it had to have
12 been in a conversation, you know. You know, and
13 I've tried to search my memory a lot on this, you
14 know. We have a lot of -- you know, like a lot
15 of government agencies that talk to us on various
16 things at one time, you know, between this and
17 this, and all the regulatory functions that we
18 deal with. And so -- you know, it could even
19 be -- I just don't know. It could have been, you
20 know, probably related to the fact that we -- we
21 graze cattle out on corn stocks in the winter
22 and, it may have been a conversation with my son,
23 you know that -- because a lot of those areas are
24 not fenced, you know; we put up temporary fencing
25 for those cattle. And so the actual time frame I

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ERIKA L. RIVERA, by and through)
LOREE RIVERA her mother and natural)
guardian, et al.,)

Plaintiffs,)

vs.)

No. CV05-4848)

DALE W. PIERCY, individually, and)
JENNIFER SUTTON, individually,)

Defendants.)

DEPOSITION OF DALE W. PIERCY

MAY 10, 2006

REPORTED BY:

DEANN MORRIS, CSR No. 747, RPR

Notary Public

EXHIBIT G

1 DALE W. PIERCY,
2 first duly sworn to tell the truth relating to said
3 cause, testified as follows:

4 EXAMINATION

5 QUESTIONS BY MR. WALTON:

6 Q. Would you state your name for the record,
7 please.

8 A. Dave Piercy.

9 Q. And what's your age, Mr. Piercy?

10 A. 57.

11 Q. Where do you reside?

12 A. Parma, Idaho.

13 Q. Give me a little bit of -- what do you do? Let
14 me ask you that first.

~~15 A. I'm a farmer and rancher.~~

16 Q. And how long have you been a farmer and a
17 rancher?

18 A. Since I was probably seven years old, so 50
19 years.

20 Q. Where have you farmed and ranched?

21 A. Parma area.

22 Q. All your life?

23 A. Yes.

~~24 Q. Did you go to school?~~

25 A. Yes.

1 Q. (BY MR. WALTON): In other words, outside of the
2 enclosures.

3 A. I try to keep my cattle in the pasture.

4 Q. It's accurate to say, is it not, that you've
5 been a cattleman in Canyon County for -- what did you
6 tell me -- 50 years; right?

7 A. Yes.

8 Q. ~~**As of March 20th, 2005, all lands upon which~~
9 livestock are pastured in Canyon County are lands which
10 are enclosed by fences; correct?

11 MS. MEIKLE: Objection to the form of the question
12 and calls for a legal conclusion.

13 Counsel, if you're asking him all lands in Canyon
14 County, you're asking for a legal conclusion. And I'm
15 going to object --

16 MR. WALTON: Go ahead. Have at it.

17 MS. MEIKLE: -- and ask him not to respond.

18 MR. WALTON: Well, you're going to take a risk
19 because I'm going to take this before the Court.

20 So you're instructing him not to respond?

21 MS. MEIKLE: I'm objecting to --

22 MR. WALTON: You're free to object.

23 MS. MEIKLE: It calls for a legal conclusion.

24 MR. WALTON: It actually doesn't. It's a factual
25 question.

1 this question.

2 All the cattle in Canyon County are fenced in,
3 aren't they?

4 MS. MEIKLE: Objection to the form of the question.

5 THE WITNESS: Should I answer?

6 MS. MEIKLE: Do you know the answer to the
7 question?

8 THE WITNESS: No.

9 Q. (BY MR. WALTON): What cattle are not fenced in?

10 A. There's different boundaries and fences on
11 other different ranches.

12 Q. Well, when you say "not fenced in," you mean
13 like there's sometimes rivers that keep the cattle in;
14 right?

15 A. Yes.

16 ~~Q. Let's rephrase it then.~~

17 You're not aware of any cattle in Canyon County
18 that roam free, are you?

19 MS. MEIKLE: Objection to the form of the question.

20 THE WITNESS: I don't understand what you mean by
21 "roam free." Where?

22 Q. (BY MR. WALTON): Outside of boundaries such as
23 fences, rivers, or natural barriers that contain the
24 livestock.

25 MS. MEIKLE: Objection to the form of the question.

1 You can answer if you understand.

2 THE WITNESS: No.

3 Q. (BY MR. WALTON): What do you mean "no"?

4 A. Everything is contained.

5 ~~Q. Okay. That's what I thought. Thanks.~~

6 MR. EVETT: Would this be a good time to take a
7 break?

8 MS. MEIKLE: I'd like to take one.

9 MR. WALTON: Fine by me.

10 (Recess taken.)

11 MR. WALTON: Let's go on the record.

12 Would you mark that as an exhibit for me.

13 (Exhibit 8 marked.)

14 Q. (BY MR. WALTON): Mr. Piercy, I'm handing you
15 Exhibit 8. On Exhibit 8 there is a road going down the
16 middle of the photograph that's colored in orange that
17 is Wamstad Road; correct?

18 A. Correct.

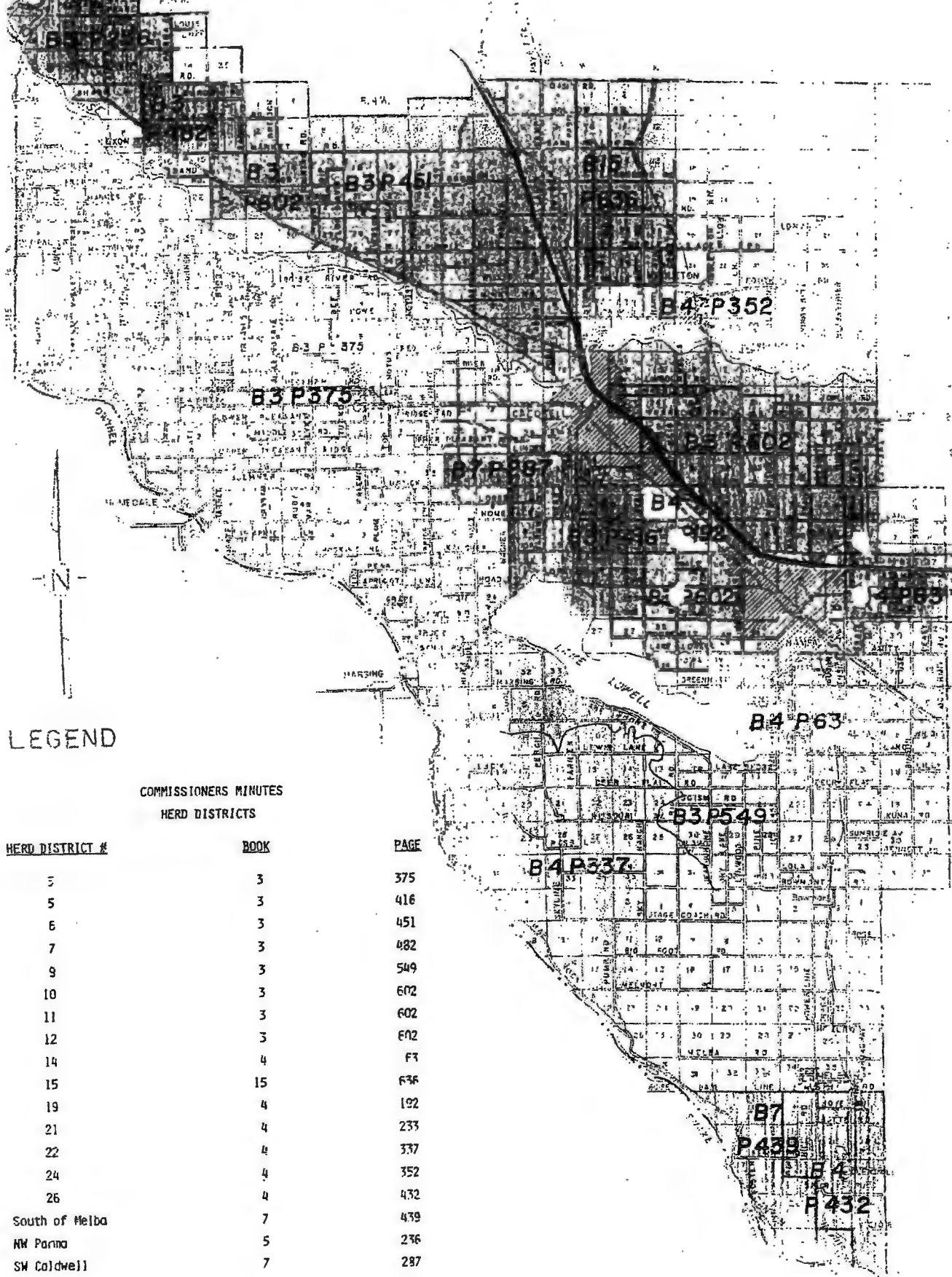
19 Q. And then there's a road colored in yellow that
20 is Lee Lane; correct?

21 A. Correct.

22 Q. And you have been kind enough to color in for
23 me some lands both to the east and to the west of
24 Wamstad Road and north of the Boise River; correct?

25 A. Correct.

STATE OF IDAHO



LEGEND

COMMISSIONERS MINUTES
HERD DISTRICTS

HERD DISTRICT #	BOOK	PAGE
3	3	375
5	3	416
6	3	451
7	3	482
9	3	549
10	3	602
11	3	602
12	3	602
14	4	F3
15	15	F36
19	4	192
21	4	233
22	4	337
24	4	352
26	4	432
South of Melba	7	439
NW Parma	5	236
SW Caldwell	7	287

1 A. Yes. I started with Canyon County in
2 1988 in another department, and then I came to
3 the commissioners' office in 1989.

4 Q. And since the time that you've worked
5 with the commissioners' office, has there been
6 any change in how you deal with these
7 commissioner files?

8 A. No.

9 Q. Let me ask you this. In preparation
10 for this deposition today, did you review any
11 files?

12 A. The only file I have for the herd
13 district is this document that I brought here,
14 this order establishing a herd district.

15 Q. Okay.

16 A. And this was a strange -- a strange
17 file, if you will, because when I came to the
18 office the lady who trained me had a copy of this
19 order. It was attached to the wall because, as I
20 was told, once a year you'd get a call from
21 someone saying, "I want to know what section of
22 Canyon County is a herd district."

23 And I was told "All of Canyon County is
24 a herd district, and if they want to see the
25 documentation, give them this" (indicating). And

1 that's -- this is all I've ever been able to
2 locate in our office, is this document, so it's
3 been hanging on our wall for many, many years.

4 ~~MR. PECK: Just for purposes of the~~
5 record, let's go ahead and have that packet of
6 documents there designated as Exhibit A to your
7 deposition.

8 (Exhibit A is marked.)

9 Q. (BY MR. PECK) Now, with regards to
10 Exhibit A, that first page, this is the one that
11 you had just mentioned was evidently hanging
12 somewhere in the commissioners' office?

13 A. Yes.

14 Q. And it's just on a cork board or --

15 A. When I started in that office, the
16 switchboard was located there. So there was a
17 desk that had the -- the switchboard for the
18 entire courthouse, and there were a number of
19 things, telephone numbers for various department
20 heads, this document (indicating). And as near
21 as I can recall, that was about it. It was
22 pinned to the wall.

23 Q. And to make sure I understand it, it
24 was just this first page; is that correct?

25 A. I believe the -- oh. I want to say

LUIS J. GUZMAN, individually,)
Plaintiff,)
vs.)
DALE PIERCY, individually, and) Case No. CV05-4848
JENNIFER SUTTON, individually,)
Defendant.)
_____)
CANYON COUNTY)
Third Party Defendant.)
_____)

AUGUST 25, 2008

NOTARY PUBLIC

1046

1 some of the Idaho Code?

2 A. A portion of the Idaho Code.

3 Q. And on the front page in the middle
4 there it says "Republished."

5 What is the year on there?

6 A. 1949.

7 Q. So let's turn to the second page.

8 There on second page we have Chapter 24. And
9 underneath that it says, "Herd Districts."

10 Do you see that?

11 A. The third page?

12 Q. The third page.

13 A. State the question again.

14 Q. Do you see in the middle where it says,
15 "Chapter 24 - Herd Districts"?

16 A. Yes.

17 Q. Have you had a chance to review that
18 second page?

19 A. Just briefly.

20 Q. And does that appear to be the statutes
21 governing creation of herd districts?

22 A. Yes.

23 Q. Now, as part of this litigation -- I
24 guess the reason why we are talking with you
25 today is because the Canyon County Commissioners

1 in 1982 passed an ordinance that purportedly
2 establishes a herd district.

3 Is that your understanding?

4 A. Yes.

5 Q. Do you currently have a memory of that
6 event?

7 A. I'm sorry, I really don't.

8 Q. Do you recall that that is something
9 that you did?

10 A. I remember there was a discussion.

11 ~~Q. Now, when there was a discussion about~~
12 this do you recall looking over the Idaho Code in
13 preparing to do that herd district?

14 A. I do not.

15 MR. WALTON: Does that mean you didn't?
16 Or does that mean you don't recall?

17 THE WITNESS: I don't recall.

18 Q. (BY MR. PECK) So you could have, you
19 just don't remember?

20 A. I don't remember.

21 Q. Why don't you read Idaho Code 25-2401
22 there right under the "Herd Districts" caption?

23 A. "The board of county commissioners of
24 each county in the state shall have power to
25 create herd districts within such county as

1 in 1982 passed an ordinance that purportedly
2 establishes a herd district.

3 Is that your understanding?

4 A. Yes.

5 Q. Do you currently have a memory of that
6 event?

7 A. I'm sorry, I really don't.

8 Q. Do you recall that that is something
9 that you did?

10 ~~A. I remember there was a discussion.~~

11 Q. Now, when there was a discussion about
12 this do you recall looking over the Idaho Code in
13 preparing to do that herd district?

14 A. I do not.

15 MR. WALTON: Does that mean you didn't?
16 Or does that mean you don't recall?

17 THE WITNESS: I don't recall.

18 ~~Q. (BY MR. PECK) So you could have, you~~
19 just don't remember?

20 A. I don't remember.

21 Q. Why don't you read Idaho Code 25-2401
22 there right under the "Herd Districts" caption?

23 A. "The board of county commissioners of
24 each county in the state shall have power to
25 create herd districts within such county as

1 hereinafter provided; and when such district is
2 so created the provisions of this chapter shall
3 apply and be enforceable therein."

4 Q. As you look at this statute do you
5 remember -- does anything about it sound
6 familiar? I mean, does that help at all after
7 reading through the statute to help you remember
8 if you read it at that time or not?

9 A. It does not.

10 Q. Now, in the next section, 25-2402, it
11 talks about petition for district. And it says,
12 "A majority of the landowners in any area or
13 district is described by metes and bounds not
14 including open range and who are also resident
15 in, and qualified electors of, the State of Idaho
16 may petition the board of county commissioners in
17 ~~writing to create such area a herd district."~~

18 Now, in 1982, in conjunction with what
19 I'm going to call the '82 ordinance, do you
20 recall there being a petition that was submitted
21 to create a herd district?

22 A. I'm sorry, I do not recall that.

23 MR. WALTON: Same question. Does that
24 mean that you don't know if there was or wasn't a
25 petition? Is that what you are saying?

1 THE WITNESS: That's what I'm saying.

2 ~~MR. WALTON: Thank you.~~

3 (Exhibit 2 marked.)

4 Q. (BY MR. PECK) I have handed you what I
5 have marked as Exhibit No. 2. Now, in looking at
6 Exhibit 2, down there towards the bottom, there
7 is a caption "Canyon County Board of County
8 Commissioners Public Hearing Minutes." And I'll
9 just represent that this is from Book 22. This
10 came out of the recorder's office from the
11 minutes that are kept there. And if you could
12 just read that for me. Not out loud. But to
13 yourself. That section there. Those public
14 hearing minutes.

15 A. (Complying).

16 Q. Well, wait a second. That is not the
17 one I want. Hold on. I apologize. This is the
18 one I wanted.

19 (Exhibit 3 marked.)

20 Q. (BY MR. PECK) We have marked that as
21 Exhibit 3. This is the same thing. These are
22 minutes. And I guess the date up there is
23 December 2, 1982. Do you see that?

24 A. Yes.

25 Q. And then we have in the middle that

1 says, "Resolution passed regarding herd districts
2 in Canyon County." And if you could read that
3 portion to yourself. And let me know when you
4 are done.

5 A. (Complying). I have read it.

6 Q. Now, in reading through those minutes
7 do you recall at all having a meeting on
8 December 2, 1982 regarding this resolution that
9 Commissioner Hobza made?

10 A. No.

11 Q. Do you remember discussing the issue
12 regarding having confusion existing due to the
13 overlapping lines of the herd districts in Canyon
14 County?

15 A. Way back in the back of my mind I just
16 recall that there was an issue regarding a herd
17 district. And that a portion of it was not -- a
18 portion of Canyon County was not in the herd
19 district. And that's about the extent of what I
20 remember.

21 Q. Now, I take it that you remember
22 Commissioner Hobza; is that correct?

23 A. Yes.

24 Q. Just solely based on what it says here
25 in the minutes it sounds as if this was his

1 by posting notices thereof in three conspicuous
2 places in the proposed herd district, and by
3 publication for two weeks previous to said
4 hearing in a newspaper published in the county
5 nearest the proposed herd district."

6 Now, having read that language would it
7 be correct, based on your prior testimony, that
8 with regard to notice of this hearing for a herd
9 district that that would be the job of the
10 secretaries to put that notice in the paper?

11 A. Yes.

12 Q. And do you recall with regards to the
13 herd district discussions that you have had that
14 there was a -- whether or not there was a notice
15 published for the hearing on the herd district
16 ordinance?

17 A. No, I do not recall anything.

18 MR. WALTON: Again, you don't recall if
19 one was or was not?

20 THE WITNESS: Right.

21 MR. WALTON: Thank you.

22 Q. (BY MR. PECK) Now, looking at Exhibit
23 No. 3 in the minutes there. Based solely in
24 looking at these minutes I don't see any language
25 there regarding whether or not a petition was

1 sent out.

2 Would it be your typical practice in
3 this type of meeting to have included in the
4 minutes that a published notice had been sent
5 out?

6 MR. SAARI: Objection. Lack of
7 foundation.

8 MR. WALTON: Join. I believe he has
9 testified the secretaries did that for him.

10 Q. (BY MR. PECK) You can go ahead and
11 answer the question.

12 A. State the question again.

13 Q. Let me have the court reporter read it
14 back.

15 (Record read.)

16 THE WITNESS: I guess I can't answer
17 that. I just don't recall one way or the other.
18 Whether those were attached or whether they
19 weren't.

20 Q. (BY MR. PECK) So let me make sure I
21 understand you. You are not sure whether or not
22 it was your typical practice to include that in
23 the minutes or not? Or have that included in the
24 minutes?

25 A. That's correct.

1 (Exhibit 4 marked.)

2 Q. (BY MR. PECK) Mr. Koch, do you
3 recognize Exhibit No. 4?

4 A. It's an Order Establishing Herd
5 District.

6 Q. If you could just review that and let
7 me know when you are done reviewing that order.

8 A. I have read it.

9 Q. When was the date of this order?

10 A. December 9, 1982.

11 Q. And looking down in the body of the
12 order just above the signatures. That last line.

13 ~~"It is hereby ordered."~~

14 What is the date contained there in the
15 body?

16 A. December 10, 1982.

17 Q. And then in the signature portion, that
18 bottom signature above Glenn O. Koch, is that
19 your signature?

20 A. Yes, it is.

21 Q. Do you recall signing this order?

22 A. No, I do not.

23 ~~Q. Now, in the body of the -- well, let me~~
24 do this first.

25 (Exhibit 5 marked.)

1 Q. (BY MR. PECK) Mr. Koch, have you had a
2 chance to review No. 5?

3 A. Yes.

4 Q. Now, in Exhibit 4, the Order
5 Establishing Herd District, under No. 1, it says,
6 "A survey map attached hereto, prepared by the
7 Planning and Zoning Administrator, designates the
8 three small areas within the county which remain
9 open range."

10 Do you recall whether or not you saw
11 that survey map?

12 A. I don't remember seeing it.

13 MR. WALTON: Are you saying you don't
14 remember if you did or you didn't see it? Or are
15 you saying you don't think you did see it?

16 THE WITNESS: I don't remember seeing
17 it. That is what I'm saying.

18 Q. (BY MR. PECK) Now, looking at Exhibit
19 No. 5. Do you recall having ever seen that map
20 before?

21 A. No, I don't recall ever having seen it.
22 I probably did, but I don't recall.

23 Q. Let's go back just for a minute to
24 Exhibit No. 2. Again, down there where it reads,
25 "Canyon County Board of County Commissioners

1 THE WITNESS: Well, it says that it is
2 hereby ordered by the Board of Canyon County
3 Commissioners that on the 10th day of December,
4 1982, that a herd district be established.

5 Q. (BY MR. PECK) And so as being part of
6 the panel that signed this document is it your
7 understanding that that was intended to be the
8 date it was to commence?

9 MR. SAARI: Objection. He earlier
10 testified he doesn't have the recollection of the
11 events. You are asking him to speculate,
12 guesstimate on matters many, many years ago that
13 he has no independent memory.

14 THE WITNESS: I don't recall.

15 Q. (BY MR. PECK) Do you recall ever
16 having any conversations with your fellow
17 commissioners, Commissioner Hobza and
18 Commissioner Bledsoe, regarding what type of
19 animals they wanted the herd district to apply
20 to?

21 MR. SAARI: Objection. We supplied
22 discovery, Counselor, to you indicating both of
23 those people are dead and deceased. Having him
24 testify as to people who are no longer here to be
25 deposed is not proper.

1 THE WITNESS: Well, it says that it is
2 hereby ordered by the Board of Canyon County
3 Commissioners that on the 10th day of December,
4 1982, that a herd district be established.

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6 the panel that signed this document is it your
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10 testified he doesn't have the recollection of the
11 events. You are asking him to speculate,
12 guesstimate on matters many, many years ago that
13 he has no independent memory.

14 ~~THE WITNESS: I don't recall.~~

15 Q. (BY MR. PECK) Do you recall ever
16 having any conversations with your fellow
17 commissioners, Commissioner Hobza and
18 Commissioner Bledsoe, regarding what type of
19 animals they wanted the herd district to apply
20 to?

21 MR. SAARI: Objection. We supplied
22 discovery, Counselor, to you indicating both of
23 those people are dead and deceased. Having him
24 testify as to people who are no longer here to be
25 deposed is not proper.

1 Q. (BY MR. PECK) You can go ahead and
2 answer the question.

3 A. No, I don't recall any conversations
4 specifying animals.

5 ~~Q. You had stated that you were unfamiliar~~
6 ~~with the concept of a herd district. At the time~~
7 ~~this order was put out there did you have a~~
8 ~~concept of what the term "open range" entailed?~~

9 A. That is pretty self-explanatory. Open
10 range is open range.

11 Q. Now, do you recall it being the intent
12 of this order to place a herd district over the
13 open range areas in Canyon County?

14 MR. SAARI: Objection. The document
15 speaks for itself.

16 THE WITNESS: Yes.

17 MR. PECK: That is all the questions I
18 have. Oh, wait. One more. I guess this is just
19 to see if I can spark your memory at all. I'm
20 not going to make it an exhibit. But I'm going
21 to have you look at it.

22 Q. (BY MR. PECK) Now, in reviewing that
23 map --

24 MR. SAARI: If you are going to ask him
25 to try to spark his memory you need to mark

1 that we are going to make color copies of that
2 and include one as Exhibit 6 in the record.

3 Does that sound good?

4 ~~MR. WALTON: Thank you.~~

5 Q. (BY MR. PECK) Now, looking over
6 Exhibit No. 6 there, Mr. Koch. Do you recall
7 seeing that particular map before? What is
8 represented there?

9 A. No, I don't. I thought there was just
10 one area in Canyon County that was not included
11 in the herd district. In my mind, before coming
12 here today, I felt there was only one area in
13 Canyon County that was not included in the herd
14 district. And coming here today I find that
15 there were three. And I assume that these white
16 areas are the three areas that were not included.

17 ~~MR. PECK: That is all the questions I~~
18 have.

19 MR. SAARI: I just have a question or
20 two.

21
22 EXAMINATION

23 QUESTIONS BY MR. SAARI:

24 Q. Mr. Koch, based upon your testimony
25 here today, with the events having occurred so

Bill Staker Depo

1 DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2 STATE OF IDAHO, COUNTY OF CANYON
3 ----0000000----
4 LUIS J. GUZMAN, individually,)
5 Plaintiff,) Case No. CV05-4848
6 vs.)
7 DALE PIERCY, individaully,) Deposition of:
8 and JENNIFER SUTTON,) BILL A. STAKER
9 individually,)
10 Defendants.)
11 CANYON COUNTY,)
12 Third Party Defendant)

13 ----0000000----
14
15 The deposition of BILL A. STAKER, a
16 witness in the above-entitled cause, taken at the
17 instance of the Defendant Dale Piercy, at the
18 offices of Horizon Reporting, 299 South Main Street,
19 Salt Lake City, Utah, on September 22, 2008, at
20 11:00 a.m., before Jerry Martin, Registered
21 Professional Reporter and Notary Public in and for
22 the State of Utah.

23 HORIZON REPORTING & VIDEO, INC.
24 NATIONAL DEPOSITION SERVICE
(800) 570-DEPO (3376)
25 Job No. 092208JM

2

1 A P P E A R A N C E S
2 For the Plaintiff: TIMOTHY C. WALTON, ESQ.
Page 1

EXHIBIT K

7 Bill Staker Depo
any instructions on how to proceed?

8 A. No. No. They would have probably gone
9 to the prosecuting attorney who also acted as their
10 civil attorney.

11 MR. POPE: Let's have that marked was
12 Exhibit 1.

13 (Exhibit 1 was marked.)

14 Q. Mr. Staker, I'm handing you what's been
15 marked as Exhibit 1 for your deposition. This is
16 part of the Idaho Code, 1968 edition. This is
17 entitled 25, Chapter 24, concerning Herd Districts.
18 I'm going to have you look at a couple of sections,
19 and we'll talk about these for a moment. If you
20 will look at the bottom of the page I've opened to,
~~21 which is Page 436, entitled -- I'm sorry --~~
22 Section 25-2402, "Petition for district," do you
23 have any personal knowledge of a petition for a herd
24 district being submitted in 1980, '81, or '82?
25 A. No.

□

15

1 Q. would the clerk's office have received
2 any type of petition for a herd district?

3 A. I don't know.

4 Q. would that have been a normal matter
5 filed with the clerk's office for any reason?

6 A. I don't know that either.

~~7 Q. Okay. If you'd look across the column
8 there on what is Page 437, Section 25-2403, "Notice
9 of hearing petition," it states that the board of~~

10 Canyon commissioners after a petition for a herd
11 ~~district is filed set a date and published a notice~~
12 of hearing. Do you have any personal recollection
13 of a notice of hearing being published by the county
14 commissioners in the early '80s concerning herd
15 districts?

16 A. No, I don't.

17 ~~MR. POPE: Okay. Thank you.~~

18 Let's mark that Exhibit 2, please.
19 (Exhibit 2 was marked.)

20 Q. I'm handing you what's been marked as
21 Exhibit 2, which are minutes from December 2, 1982.
22 In the center of the page there it states,
23 "Resolution Passed Regarding Herd District in Canyon
24 County." Do you recall being present at a hearing
25 of the county commissioners in December of 1982

16

1 where herd districts were discussed?

2 A. No, I don't, but this does look like one
3 of our -- an entry out of one of our minute books.

4 Q. Would this have been one of those
5 hearings, then, that you stated earlier where one of
6 your support persons, deputy clerks, would have
7 attended?

8 A. Yes.

9 Do you mind if I take time to read this?

10 Q. No. Please do.

11 (Mr. Staker reviews document.)

12 Mr. Staker, the first line of that

13 particular paragraph says, "The following Resolution
14 was considered and adopted by the Canyon County
15 Board of Commissioners on the 2nd day of December,
16 1982." Do you remember what the resolutions were as
17 far as how the county commissioners acted on those?
18 I know that's a really bad question. Let me try
19 that again. What was a resolution as far as the
20 county commissioners were concerned?

21 MR. SAARI: Objection to the form of the
22 question. It's very confusing.

23 THE WITNESS: I agree with that. I
24 don't quite understand what you're asking.

25 Q. (BY MR. POPE) The commissioners say

17

1 here that this was a resolution which was
2 considered. Do you have any knowledge or
3 recollection of what resolutions were as far as
4 how -- I'm still not getting that. Let me try it
5 different.

6 Petitions would be filed by members of
7 the public for the commissioners' consideration.
8 This Exhibit 2 talks about a resolution. Do you
9 know if there was any difference between the two?

10 A. No, I don't.

11 Q. And I believe you've already testified
12 that you were not personally aware of any petition
13 for herd districts by anyone in the early '80s.

14 A. I can't state whether there was one or
15 whether there was not one. I don't have any memory

16 of it.

17 ~~Q. Do you know whether or not a resolution~~
18 of the board of county commissioners would require a
19 notice of hearing for the public's information?

20 MR. SAARI: Objection to the form of the
21 question. The witness is being asked to express a
22 legal opinion that's beyond his ability to do so.

23 Q. (BY MR. POPE) You can go ahead and
24 answer it.

25 A. The board of county commissioners would

18

1 go to the prosecuting attorney and make those kind
2 of decisions, not me.

3 MR. POPE: Mark this as Exhibits 3 and
4 4.

5 (Exhibits 3 and 4 were marked.)

6 Q. (BY MR. POPE) Exhibit 3 is a
7 December 10, 1982 "Order Establishing Herd
8 District," and Exhibit 4 is a two-page map of Canyon
9 County with herd districts defined. We'll go to
10 Exhibit 3 first if you don't mind.

11 A. Okay.

12 Q. At the bottom of the page under the
13 bottom left-hand corner there it says "Attest:
14 Bill A. Staker" and then "Jeanie Irvine." Is that
15 your signature?

16 A. No. That's not my stamp either. This
17 is a fairly common way that my deputies would attest
18 to something. They would sign my name and then

Bill Staker Depo

16 of it.

17 Q. Do you know whether or not a resolution
18 of the board of county commissioners would require a
19 notice of hearing for the public's information?

20 MR. SAARI: Objection to the form of the
21 question. The witness is being asked to express a
22 legal opinion that's beyond his ability to do so.

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5 ~~(Exhibits 3 and 4 were marked.)~~

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7 December 10, 1982 "Order Establishing Herd
8 District," and Exhibit 4 is a two-page map of Canyon
9 County with herd districts defined. We'll go to
10 Exhibit 3 first if you don't mind.

11 A. Okay.

12 Q. At the bottom of the page under the
13 bottom left-hand corner there it says "Attest:
14 Bill A. Staker" and then "Jeanie Irvine." Is that
15 your signature?

16 A. No. That's not my stamp either. This
17 is a fairly common way that my deputies would attest
18 to something. They would sign my name and then

Bill Staker Depo

19 either a dash or a slash or a dot, their name, which
20 means they attest in my power by my deputy. She's
21 actually saying she's a deputy there. She's a
22 deputy clerk.

23 Q. So you're saying that Jeanie Irvine
24 would have signed your name, Bill A. Staker, to the
25 bottom of Exhibit 3.

19

1 A. That is correct.

2 Q. Do you recall ever seeing this order
3 before?

4 A. No, I don't.

5 Q. Do you recall having any input as to the
6 language of the order in Exhibit 3?

7 A. Let me read it first.

8 (Mr. Staker reviews document.)

9 What was your question again?

10 Q. Do you recall having any input to the
11 county commissioners as to the language found in the
12 order?

13 A. I had no input to this.

14 Q. Do you have any recollection as to being
15 advised by the commissioners in December of 1982
16 that they were going to create this order?

17 A. I don't recall.

~~18 Q. I'm not asking you to guess. I'm asking~~
19 if you recall. would Jeanie Irvine have been
20 present when this order was signed by the
21 commissioners?

Bill Staker Depo

22 A. I have no knowledge of the meeting. I
23 obviously wouldn't have any knowledge of whether she
24 was there or not. Now, do you want me to guess?

25 Q. No, I do not.

20

1 A. Okay.

2 Q. Would it be the standard practice,
3 though, for a person like Jeanie Irvine to be
4 present when these orders were signed?

5 A. Yes.

6 Q. If you'd look now at Exhibit No. 4.
7 Have you ever seen that map before?

8 A. It's a map of Canyon County. The
9 possibility that I've seen it is probably pretty
10 good, but I can't attest that I have actually seen
11 this map before. I've seen thousands of maps of
12 Canyon County. It is very similar to what we would
13 do for elections, and I put out literally hundreds
14 of maps for the election department. They were all
15 of Canyon County, and they're all color coded and
16 stuff like that. I cannot say I have not seen this,
17 but I can't attest that I have either.

18 Q. Okay. Thank you.

19 If you'd look back at Exhibit 3, in
20 paragraph 1 it says, "A survey map attached hereto,
21 prepared by the Planning and Zoning Administrator,
22 designates the three small areas within the County
23 which remain open range." what would be the normal
24 procedure for an attachment to an order such as

25 this?

21

1 A. I don't know. You're asking questions
2 that I can't even recall happened let alone having
3 to attest to them.

4 Q. I appreciate that, Mr. Staker. Do you
5 have any recollection as to whether Exhibit 4 would
6 be the map that is referred to in paragraph 1 of
7 Exhibit 3?

8 A. No, I don't.

9 ~~Q. What would the Canyon County clerk's~~
10 office do with an order such as Exhibit 3 once the
11 commissioners had signed it?

12 A. Say that again. I'm sorry.

13 Q. The commissioners signed this in
14 December of 1982. What would the clerk's office do
15 with this order once it was signed?

16 A. The commissioners' proceedings are
17 generally published as I recall, and then it would
18 be filed, because this is part of the permanent
19 record.

20 Q. When you say "published," what do you
21 mean by published?

22 A. In the newspaper. I assume it's still
23 done today. It is here. You'll see a proceedings
24 that the commissioners considered, that they passed
25 this, passed this, considered this, tabled this,

22

Bill Staker Depo

3 As far as personal associations after business
4 hours, zero.

5 MR. POPE: Okay. Great.

6 Mr. Staker, that's all the questions I
7 have. I thank you very much for your time.

8 Counsel, does anybody have any questions
9 for Mr. Staker?

~~10 MR. WALTON: Just one question.~~

11 This is Tim Walton, Mr. Staker, and I
12 think you answered this question, but I just wanted
13 the record to be clear. The question was posed to
14 you whether or not a notice of hearing was published
15 in the newspaper with respect to the herd district
16 that was created by the county commissioners in
17 1982. Do you recall that question?

18 THE WITNESS: Yes.

19 MR. WALTON: And as I understood your
20 answer, you don't know if a notice of hearing was or
21 was not published in the paper about that hearing.
22 Is that your testimony?

23 THE WITNESS: Yes, it is.

~~24 MR. WALTON: That's all I have.~~

25 MR. POPE: Mr. Saari? Ms. Sullivan?

24

1 MS. SULLIVAN: I don't have any
2 questions.

3 MR. POPE: Mr. Saari?

4 MR. SAARI: I have no questions.

5 MR. POPE: Mr. Staker, thank you very
Page 21

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Attorneys for Defendant Jennifer Sutton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually)

Plaintiff,)

v.)

DALE PIERCY, individually and)
JENNIFER SUTTON, individually,)

Defendants.)

DALE PIERCY, individually,)

Plaintiff,)

CANYON COUNTY, LUIS GUZMAN,)
individually and JENNIFER SUTTON,)
individually,)

Defendants.)

Case No. CV05-4848

MEMORANDUM IN SUPPORT OF
DEFENDANT JENNIFER SUTTON'S
MOTION FOR RECONSIDERATION

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION- 1

I. INTRODUCTION

On April 30, 2008, the Honorable Gordon W. Petrie entered his Order on Motion to Reconsider. On January 21, 2009, Judge Petrie entered his Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial (“Judgment”) following a bench trial held on October 8, 2008, on the validity of the 1982 Canyon County herd district ordinance. Defendant Jennifer Sutton (“Sutton”) now files this Memorandum in Support of her Motion for Reconsideration. Sutton requests that this Court reconsider the Order on Motion to Reconsider entered by Judge Petrie precluding Sutton from asserting the affirmative defenses of estoppel and laches against Defendant Dale Piercy’s challenge to the 1982 Canyon County herd district ordinance. Sutton also requests that this Court reconsider the Judgment entered by Judge Petrie for purposes of considering Sutton’s affirmative defenses of estoppel by laches, estoppel by waiver, equitable estoppel and statute of limitations pursuant to Idaho Code §§ 5-224. Sutton also requests this Court to clarify and to correct a factual error in the Judgment.

II. FACTUAL HISTORY AND PROCEDURAL BACKGROUND

This action arises out of a motor vehicle collision with a black bull occurring in the late evening hours of Sunday, March 20, 2005. Sutton, with Plaintiffs Erika L. Rivera and Luis J. Guzman (collectively “Plaintiffs”) as passengers, was traveling northbound on Wamstad Road, just south of Parma, when Sutton’s vehicle collided with a black bull owned by Defendant Dale W. Piercy (“Piercy”).

The accident occurred in an area designated as a herd district by the Canyon County Commissioners on July 18, 1908. (Affidavit of Joshua S. Evett in Support of Defendant Jennifer

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON’S MOTION FOR RECONSIDERATION– 2

Sutton's Motion for Reconsideration ("Evett Aff."), ¶ 3.) The bull involved in the collision was pastured in a field east of Wamstad Road, north of the Boise River bridge and south of Parma upon land designated as a herd district by the Order of the Canyon County Commissioners dated December 10, 1982. (Evett Aff., ¶¶ 4, 5.)

Rivera and Guzman filed a personal injury action against Piercy and Sutton. Rivera ultimately settled her claims. On or about May 1, 2007, Piercy filed a motion for summary judgment seeking a judgment from the Court that the 1908 and 1982 herd district ordinances were void on the grounds that the ordinances did not comply with the requirements of Title 25, Chapter 24, Idaho Code. Piercy argued that if the 1908 and the 1982 herd district ordinances were invalid, the area where the bull was pastured, and the location where the accident occurred would be open range, and Piercy would be immune from liability for the accident pursuant to Idaho Code § 25-2118. Sutton opposed the motion, in part, arguing that Piercy's challenge to the 1982 herd district ordinance twenty-five years after its passage was barred by the doctrine of estoppel by laches. Guzman also opposed the motion, in part, arguing that Piercy was estopped from challenging the validity of the herd district ordinances.

On or about October 9, 2007, the District Court entered its Order Denying Defendant Percy's [sic] Motion for Summary Judgment, Joining Canyon County, and Holding all Other Motions in Abeyance Until the Herd District's Validity is Resolved ("Order Denying Defendant Piercy's Motion for Summary Judgment"). Therein, the District Court denied Piercy's motion for summary judgment on the validity of the herd districts on the grounds that there existed genuine issues of material fact. (Order Denying Defendant Piercy's Motion for Summary

Judgment at 23.) The Court further concluded that the validity of the herd districts was a legal issue that required resolution prior to litigating the damages issues. (*Id.* at 22.) To fully resolve the herd district issues, the Court further concluded that it was necessary to join Canyon County as a party. (*Id.* at 22-24.) The Court directed Sutton's counsel "to prepare and serve the necessary pleadings to join Canyon County...as a third-party defendant."¹ (*Id.* at 24.) The Court did not address whether Piercy was estopped from challenging the validity of the herd district ordinances.

Guzman, joined by Sutton, moved the Court to reconsider its Order Denying Defendant Piercy's Motion for Summary Judgment on the grounds that the Court failed to consider the estoppel arguments. On April 30, 2008, the Court entered its Order on Motion to Reconsider, denying Guzman and Sutton from asserting "the doctrine of quasi estoppel and the doctrine of laches against Defendant Piercy's attempt to invalidate Canyon County's Herd District ordinances." (Order on Motion to Reconsider at 20.)

Pursuant to the Order Denying Defendant Piercy's Motion for Summary Judgment, on October 15, 2007, Sutton's counsel filed the Action for Declaratory Judgment, adding Canyon County as a defendant and requesting the Court to determine the validity of the herd districts. The declaratory action was assigned the same case number as the personal injury action. On November 8, 2007, Canyon County filed its Answer of Third Party Defendant Canyon County,

¹ Procedurally, joining Canyon County as a third-party defendant was not entirely proper. Idaho Rule of Civil Procedure 14(a) provides that a defendant may bring in a third-party "who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Canyon County was not, nor could it have been liable to Piercy or Sutton for Guzman's tort claim.

Idaho. The declaratory judgment action was scheduled for a two day bench trial commencing October 8, 2008.

The parties to the declaratory judgment action were not properly aligned²; therefore, the parties stipulated to a realignment. On or about September 11, 2008, counsel for Piercy filed an Amended Action for Declaratory Relief seeking a determination that the 1908 and 1982 herd districts were invalid and naming Canyon County, Sutton and Guzman as defendants. Again, the declaratory judgment action was assigned the same case number. On or about September 23, 2008, Sutton filed her Answer to Amended Action for Declaratory Relief, asserting the affirmative defenses of estoppel by laches, estoppel by waiver, equitable estoppel, and statute of limitations pursuant to Idaho Code §§ 5-224.

Sutton filed her Pretrial Memorandum on or about September 2, 2008, which again asserted the affirmative defenses of estoppel, waiver by estoppel, and estoppel by laches.

The bench trial on the declaratory judgment action occurred as scheduled on October 8, 2008. Sutton attempted to again raise the equitable defenses of laches and estoppel at trial, and to present evidence on the same. The Court did not allow the defenses, and denied the admission of evidence. (Evelt Aff., ¶ 5.) Sutton's Post-Trial Memorandum was filed on December 3, 2008. Because of the Court's ruling on the equitable defenses, the equitable issues of estoppel and laches were not briefed in the Post-trial Memorandum. However, Sutton did fully brief the issue

²Although Sutton's counsel filed the original declaratory judgment action by order of the trial court, it was actually Piercy that was seeking a determination from the court regarding the validity of the herd district.

of whether Piercy's challenge to the 1982 herd district ordinance was barred by the statute of limitations. (Post-Trial Memorandum at 5-15.)

On January 21, 2009, the Court issued its Findings of Facts, Conclusions of Law and Judgment in Bifurcated Portion of Trial ("Judgment"), holding the 1982 herd district ordinance invalid. In sum, the Court concluded that the 1982 herd district was created without the benefit of a petition as required by Title 25, Chapter 24, Idaho Code. (Judgment at 4, 7.) Because the Canyon County Commissioners failed to follow the procedures set forth in Title 25, Chapter 24, Idaho Code, the 1982 Order Establishing Herd District was void. (*Id.* at 7.) Further, the Conclusion states "[a]ccordingly, the court concludes no herd district existed at the location of the horrific accident involving Luis Guzman and Jennifer Sutton and Dale Piercy's bull." (*Id.* at 12.) (emphasis added.) Specifically, the Court decreed: "1. The 1982 Order Establishing Herd District is invalid and void. 2. Neither Plaintiff Luiz [sic] Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy's bull in Canyon County in 2005." (*Id.* at 12-13.) (emphasis added.) The Judgment did not expressly dismiss Piercy from the personal injury lawsuit.

The Court's Judgment failed to address the equitable defenses of laches or estoppel, nor did it address the statute of limitations defense. Judge Petrie has since resigned, and the case was reassigned to this Honorable Judge.

Sutton requests reconsideration of the April 30, 2008, Order on Motion to Reconsider, and the January 21, 2009, Judgment to allow for consideration of Sutton's affirmative defenses of estoppel and statute of limitations. In the event the Court grants the Motion for

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION— 6

Reconsideration, Sutton also requests that this Court uphold the 1982 herd district ordinance.

Sutton further requests the Court clarify and correct a factual error in the Judgment, which could be read as voiding the 1908 herd district ordinance.

III. UNDISPUTED FACTS

On or about December 2, 1982, the Board of the Canyon County Commissioners approved a resolution establishing a herd district as set forth in the minutes:

RESOLUTION PASSED REGARDING HERD DISTRICTS IN CANYON COUNTY

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 2nd day of December, 1982: Upon motion of Commissioner Hobza and the second by Commissioner Bledsoe the Board resolves as follows: That because of the confusion that exists due to the over-lapping lines of herd districts and open range and because over ninety-five (95%) percent of the area of Canyon County is already designated a herd district the Board will issue an order designating all of Canyon County to be herd district as of December 14, 1982. Motion Carried Unanimously.

(Evelt Aff., ¶ 6.)

On December 10, 1982, the Board of Canyon County Commissioners issued the following Order:

ORDER ESTABLISHING HERD DISTRICT

The Board has again reviewed the complexity of the Herd District Boundaries throughout the County and has determined, by resolution, that the time has come to simplify and unify the status of Herd Districts in Canyon County. In making this determination the Board has found the following:

1. A survey map attached hereto, prepared by the Planning and Zoning Administrator designates the three small areas within the County which remain open range.

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION- 7

2. That map shows that over 95% of the land within the County is now in Herd District status.
3. Through the years confusion has existed because of overlapping boundary lines and indefinite District boundary descriptions.
4. Canyon County has reached the stage of urban development which destroys the original purpose and usefulness of the concept of open range.
5. The mobility of our citizens has increased to the point at which it becomes necessary that Herd District status exist throughout the County. Therefore,

IT IS HEREBY ORDERED by the Board of Canyon County Commissioners on this 10 day of December, 1982, that a Herd District be established in the three remaining open range areas in Canyon County as shown on the attached survey map (marked in black), to the end that the entire land area of Canyon County be placed in Herd District status.

(Evett Aff., ¶ 4.)

On December 20, 1982, the Idaho Press Tribune published the following notice:

RESOLUTION PASSED REGARDING HERD DISTRICTS IN
CANYON COUNTY

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 2nd day of December, 1982: Upon motion of Commissioner Hobza and the second by Commissioner Bledsoe the Board resolves as follows: That because of the confusion that exists due to the over-lapping lines of herd districts and open range and because over ninety-five (95%) percent of the area of Canyon County is already designated a herd district the Board will issue an order designating all of Canyon County to be herd district as of December 14, 1982. Motion Carried Unanimously.

(Evett Aff., ¶ 7.)

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION— 8

At the time the 1982 herd district ordinance was enacted, the 1963 version of the Idaho Herd District Law was in effect. *See* Idaho Code §§ 25-2401, et. seq. The Herd District Law was subsequently amended in 1983, 1985, 1990 and 1996.

IV. GOVERNING STANDARDS

Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure states, in pertinent part:

(B) Motion for Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment...

The decision to grant or deny a request for reconsideration rests within the sound discretion of the trial court. *Campbell v. Reagan*, 144 Idaho 254, 258, 159 P.3d 891, 895 (2007)(citations omitted). A motion for reconsideration allows a party an opportunity to draw the trial court's attention to **errors of law or fact in the initial decision**. *Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006). While Rule 11(a)(2)(B) permits a party to present new evidence when a motion for reconsideration is brought under this rule, it does not require that the motion be accompanied by new evidence. *Id.* at 472, 147 P.3d at 104.

V. LEGAL ANALYSIS

A. **DEFENDANT PIERCY'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS PURSUANT TO IDAHO CODE §§ 5-224.**

The Judgment entered January 21, 2009, did not address the statute of limitations defense. Should the Court grant the Motion for Reconsideration, Idaho Code §§ 5-224 would bar Piercy from challenging the validity of the 1982 herd district ordinance. Thus, the 1982 herd district ordinance should be upheld.

The limitations of action statutes apply to all actions and special proceedings. The declaratory judgment action constitutes a type of “action” limited by Idaho Code §§ 5-224.

Even assuming that there were procedural irregularities in the passage of the 1982 herd district ordinance, Piercy’s claim is barred by Idaho Code § 5-224.

Idaho Code § 5-201 sets forth the general statute of limitations provision:

Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute.

I.C. § 5-201. There is no specific statute of limitations that applies to either a declaratory judgment action, or to the underlying claim, therefore, the catchall provision applies.

Idaho Code § 5-224 is the catchall statute of limitations provision, which provides:

An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued.

I.C. § 5-224.

There is only one form of action in Idaho’s civil courts: the “civil action.” *See* I.R.C.P.

2. An “action” is further defined in Title 5, Chapter 2 to mean:

The word "action" as used in this chapter is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

I.C. § 5-240.

An action seeking declaratory judgment is authorized pursuant to Rule 57 of the Idaho Rules of Civil Procedure and Title 10, Chapter 12, Idaho Code, and constitutes “[a]n action for relief. . .” under Idaho Code § 5-224. Rule 57 of the Idaho Rules of Civil Procedure states that the Rules of Civil Procedure apply to declaratory judgment actions. A declaratory relief claim is

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON’S MOTION FOR RECONSIDERATION– 10

an “action;” the Supreme Court of Idaho has recognized this in writing “[t]his is a civil action, albeit for a declaratory judgment.” *Smith v. State Board of Medicine of Idaho*, 74 Idaho 191, 194, 259 P.2d 1033, 1034 (1953). Furthermore, the Supreme Court of Idaho awarded attorney’s fees in favor of a plaintiff in a declaratory judgment action under Idaho Code § 12-120(3), which statute allows for the recovery of attorney fees in “any civil action.”³ *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 423-424, 111 P.3d 100, 108-109 (2005).

Based on the above, the declaratory judgment action is a “civil action” under Idaho Code § 5-201 and “an action for relief...” subject to the limitations set forth under Idaho Code § 5-224.

Where there is no fraud shown, neither the ignorance of a person of his rights to bring an action, nor the mere silence of a person liable to the action, prevents the running of the statute of limitations. *Coe v. Sloan*, 16 Idaho 49, 100 P. 354, 355 (1909).

The Idaho Supreme Court has set forth the policy underlying statutes of limitation:

“The policy behind statutes of limitations is protection of defendants against stale claims, and protection of the courts against needless expenditures of resources.” *Johnson v. Pischke*, 108 Idaho 397, 402, 700 P.2d 19, 25 (1985). Statutes of limitation are designed to promote stability and avoid uncertainty with regards to future litigation.

Wadsworth v. Department of Transp., 128 Idaho 439, 442, 915 P.2d 1, 4 (1996). Additional policy reasons for the imposition of statutory time limits for filing actions are set forth in *Renner v. Edwards*:

³Idaho Code § 12-120(3) states, in pertinent part:

In any civil action to recover on ...any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs...(emphasis added.)

It is eminently clear that statutes of limitations were intended to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard for want of seasonable prosecution. They are, to be sure, a bane to those who are neglectful or dilatory in the prosecution of their legal rights. 1 Wood, Limitation of Actions, § 4, p. 8. As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 19 L.Ed. 257; 1 Wood, Limitation of Actions, *supra*, § 4; *Spath v. Morrow*, *supra* (174 Neb. 38, 115 N.W.2d 581). To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance. Cf. 34 Am.Jur., 'Limitation of Actions,' § 11, p. 20.

Renner v. Edwards, 93 Idaho 836, 838-839, 475 P.2d 530, 532 - 533 (1969), citing *Wood v. Carpenter*, 101 U.S. 135, 25 L.Ed. 807 (1879).

No matter how you look at the application of Idaho Code § 5-224, whether it applies to the declaratory judgment action itself, or to the underlying claim, there is no statute of limitations that would extend Piercy's right to bring the declaratory judgment action, or the underlying claim, nearly 25 years after the ordinance became effective.

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION- 12

Under Idaho Code § 5-224, an action “must be commenced within four (4) years after the cause of action shall have accrued.” In this case, the cause of action accrued the date the herd district ordinance went into effect.

The Idaho Supreme Court holds that the statute of limitations in a case where the validity of an ordinance is challenged begins to accrue the date of the ordinance’s passage. *Canady v. Coeur d’Alene Lumber Co.*, 21 Idaho 77, 120 P. 830, 831 (1911). In *Canady* the Supreme Court held that the statute of limitations barred an action to declare an ordinance null and void filed nine years after the ordinance’s enactment. *Id.* In *Canady*, the city of Coeur d’Alene enacted two ordinances in 1900, and another ordinance in 1905⁴, generally for the purpose of vacating certain streets and alleys in the city, with the understanding that the Coeur d’Alene Lumber Company would establish and maintain a sawmill, planing mill and lumber yard on the vacated streets. *Id.* Thereafter, the Coeur d’Alene Lumber Company expended funds to build the lumber manufacturing establishment. *Id.* at 830. Plaintiff had notice of the enactment of the ordinances and the expenditure of money in the construction of the plant and did not object at that time. *Id.*

Plaintiff’s husband owned certain lands bordering on or near the streets vacated by the ordinances. *Id.* at 832. At some point, plaintiff succeeded to the interest of her husband and brought action on June 15, 1909, to have the ordinances vacating the streets and alleys declared null and void, to compel the defendants to remove obstructions from the streets vacated by the ordinances, to enjoin the defendants from obstructing the streets in the future, and for damages. *Id.* at 831. Defendants answered the complaint and denied that plaintiff was damaged by the

⁴Ordinance No. 71 was approved March 10, 1900; No. 75 was approved November 6, 1900; and No. 115 was approved March 29, 1905.

street vacation, denied that plaintiff's land was within the city limits, and asserted the statute of limitations and estoppel. *Id.* at 832.

At the close of plaintiff's evidence, defendants moved for a nonsuit, which was granted by the court. *Id.* at 832. The Supreme Court affirmed the decision of the district court and held, in part, that plaintiff's action was barred by the statute of limitations. *Id.* at 830. In support of its decision, the Court concluded:

We think, under the facts of this case, that this action is barred by the statute of limitations: and that this action should have been brought at least within five years from the date such cause of action arose. We think it sufficiently appears that appellant sat by when Ordinances Nos. 71 and 75 were passed in 1900, and more than nine years before this action was commenced, and made no complaint of any damages having been sustained to her property by reason of said ordinances and the vacation of the streets. And, again, in 1905, when Ordinance No. 115 was passed, she made no protest or objection of any kind. She knew that the Coeur d'Alene Lumber Company was expending a great deal of money in establishing its lumber plant upon said blocks and a portion of one of the streets, and made no protest of any kind whatever to the city, and made no claim for damages to her property as resulting from the passage of said ordinances. The first time she complained of damage to her property, so far as the record shows, was when she commenced this action, June 15, 1909. *Howard Co. v. Chicago & A. R. Co.*, 130 Mo. 652. 32 S. W. 651; *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109.

Id. at 835 (emphasis added).

Under *Canady*, Piercy's challenge to the 1982 herd district ordinance is barred by the statute of limitations. The Order Establishing Herd District was enacted December 10, 1982, nearly 23 years before this action was commenced. Piercy did not raise this issue until after Guzman filed a Complaint against Piercy for damages arising from the collision between

Sutton's vehicle and Piercy's black bull. Prior to the subject accident, Piercy never complained of any damages sustained by reason of the herd district ordinance.

Piercy knew or had reason to know that the field where his bull was pastured was included in a herd district by virtue of the notice posted in the Idaho Press Tribune on December 20, 1982, indicating that the resolution regarding herd district had been passed by the Canyon County Commissioners.

Moreover, E.G. Johnson, a rancher in the area where the accident occurred and an owner of land that is within the description of the 1982 herd district ordinance, knew that the area in question was in a herd district. On or about July 18, 2007, Mr. Johnson executed an affidavit for another case that was subsequently made part of the record in this lawsuit. (*See* Second Affidavit of Ryan B. Peck, dated on or about July 30, 2007, ¶ 2, Ex. A.) Therein, Mr. Johnson stated "[s]ometime in either late 1982 or early 1983, I discovered that the above property had been placed into the herd district created by the Canyon County Commissioners in December 1982." (*Id.*, ¶ 2, Ex. A at ¶5.) Mr. Johnson testified at his deposition in this case, that he does not believe that he became aware of the herd district status in 1982 or early 1983; rather Mr. Johnson testified that he had been aware that the property was a herd district "for at least the last 12-15 years." (Evett Aff., ¶ 8.) Piercy by his own admission has been a cattle rancher in the area where the accident occurred for 50 years. (Evett Aff., ¶ 9.)⁵ It would seem unlikely that Mr. Johnson would know that his land was in a herd district, but that Piercy would not know that same information.

⁵At the Bench Trial, Piercy testified that he had been a rancher in Canyon County for over 30 years. (Evett Aff., ¶ 5.)

Furthermore, based on Piercy's presumed familiarity with the roadway where the accident occurred, he was aware that there were no open range or cattle warning signs along that section of roadway. He was aware that there were no cattle guards or other devices separating open range land from herd district land. To Piercy's knowledge all livestock in Canyon County are not allowed to roam free and are contained by fences and/or natural geographic barriers, such as rivers. (Evelt Aff., ¶ 9.)

The status and location of herd districts within Canyon County were of record. (Evelt Aff., ¶ 10.) The herd district map could be found in the Canyon County recorder's office and the Canyon County Commissioner's office. Court employees were instructed that if asked, all of the land in Canyon County was included in a herd district. (Evelt Aff., ¶ 11.) At the least, Piercy had constructive knowledge that the field where his bull was pastured was included in a herd district.

The Idaho Supreme Court holds that failure to acquire knowledge within reach does not toll the statute of limitation:

While it is stipulated that the appellants did not know of their interest in those lots until about a year before this suit was brought, that makes no difference, for they had the means of acquiring that knowledge, as the deed conveying the title to said lots to their father was of record during all that time in the office of the county recorder of Ada county, where said lots were situated. The means of acquiring this knowledge was open to them, and, under the facts of this case, that places them in the same position as though they had such knowledge. When one by his own carelessness or negligence fails to acquire knowledge that is within his reach, and such information is upon the proper records which impart constructive notice, the person cannot protect himself behind the plea that he did not know facts of which the law imputes knowledge to him and thus suspend the running of the statute. It was held in *State v. Walters*, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244, that neither the ignorance of a person of his right to bring an action, nor the mere silence of a person

liable to the action, prevents the running of the statute of limitation. *Ala., etc., Ry. Co. v. Jones*, 73 Miss. 110, 19 South. 105, 55 Am. St. Rep. 488. See, also, *Ames v. Howes*, 13 Idaho, 756, 93 Pac. 35.

Coe v. Sloan, 16 Idaho 49, 100 P. 354, 357 -358 (1909).

Piercy has benefitted from herd district status, as his lands have not been subject to depredations from the at large cattle of his neighbors. Because he is required to fence his cattle in, fewer of his livestock (and the livestock of others) have been on the roadway and subject to injury or death because of collisions with automobiles. In the same way that third party automobile drivers have been protected since 1982 by a county-wide herd district, Piercy has benefitted from that protection in his travels on roadways throughout Canyon County.

The public benefits and influence on public and private behavior of Canyon County's 25 year herd district status are significant. Cattle are not allowed on Canyon County roads, and the county's police officers have confirmed that repeatedly in deposition. For 25 years it has been a misdemeanor for a rancher in Canyon County to permit his cattle to run at large in Canyon County. See Idaho Code § 25-2407. For 25 years a rancher in Canyon County has been strictly liable for damages caused by his livestock to the property of others. See Idaho Code § 25-2408. For 25 years county commissioners have had the authority to order agricultural landowners in the vicinity of public domain where livestock are grazed to fence their land to prevent livestock in a herd district from entering onto their land. See Idaho Code § 25-2405.

Piercy should have acted promptly if he considered that his rights were invaded by the passage of the herd district ordinance. He should not have sat passively by and permitted the

Canyon County officials and the citizens of Canyon County to order itself under the belief that all of Canyon County was in a herd district. *See Canady*, 21 Idaho 77, 120 P. 830.

As stated above, the purpose of statutes of limitations is to prevent litigation of stale claims. *See Wadsworth v. Department of Transp.*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996); *Renner v. Edwards*, 93 Idaho 836, 838, 475 P.2d 530, 532 (1969). In this case, the sole living Commissioner from 1982, Glen Koch, is 80 years old and has no recollection regarding the details of the passage of the herd district ordinance. (Evet Aff., ¶ 12.) Similarly, the clerk of the district court and the commissioner's office from 1982 is now 73 and has no recollection regarding the passage of the ordinance. (Evet Aff., ¶ 13.)

There are strong policy reasons supporting statute of limitations provisions for actions attacking the validity of an ordinance based upon alleged irregularities in the ordinance's passage. At some point a statute has to have finality. If ordinances can be attacked at anytime based on procedural irregularities, without limitation as to time, then the door is open to anyone to attack any ordinance no matter how old and no matter how much evidence has been lost by time. There is no policy rationale supporting turning over a now 25+ year old statute on grounds of procedural irregularity. After the passage of so much time, these types of issues are a waste of judicial economy and resources.

Memories have lapsed, witnesses have died, and evidence has possibly been destroyed with the passage of time. Under the statute of limitations, Piercy should have brought his claim no later than December 10, 1986.

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION- 18

Based on the above, Sutton requests this Court to reconsider Judge Petrie's Judgment entered January 21, 2009, and to specifically address the statute of limitations arguments. In the event the Court grants the Motion to Reconsider and considers the merits of the statute of limitations arguments, Sutton also requests the Court uphold the 1982 herd district ordinance on the grounds that Piercy's challenge to the 1982 herd district is barred by the application of Idaho Code § 5-224.

B. PIERCY IS ESTOPPED FROM CHALLENGING THE 1982 HERD DISTRICT ORDINANCE.

The Honorable Judge Petrie did not address Sutton's estoppel arguments on the merits. The April 30, 2008 Order on Motion to Reconsider precluded Sutton from raising the affirmative defense of estoppel. This holding was reaffirmed by the Court during the October 8, 2008, bench trial on the validity of the 1982 herd district ordinance. Even though no motion had been presented to the Court to preclude the presentation of argument or evidence in support of the estoppel arguments, the Judge declined to take argument or evidence on those defenses. Thus, the Judgment entered January 21, 2009, did not address whether Piercy was estopped from challenging the validity of the 1982 herd district ordinance.

Sutton requests the Court to reconsider Judge Petrie's April 30, 2008, and January 21, 2009, decisions to specifically address the estoppel arguments on the merits. Sutton requests the opportunity to be able to submit argument and evidence in support of the estoppel defenses so that this Court may consider such arguments on the merits. Ultimately, Sutton requests the Court uphold the 1982 herd district ordinance on the grounds that Piercy's challenge to the 1982 herd district is barred by estoppel.

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION- 19

1. Piercy's challenge to the 1982 herd district ordinance is barred by the doctrine of estoppel by laches.

The doctrine of estoppel by laches is applicable in cases where a party claims that an ordinance is invalid because of the means of its enactment. Laches is a claim founded in equity and is a species of estoppel. *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004). Most cases in Idaho regarding the application of laches in the context of a challenge to a law or regulation involve municipal annexations. In *Alexander v. Trustees of Village of Middleton*, 92 Idaho 823, 452 P.2d 50 (1969), Middleton annexed land owned by plaintiff but did so in violation of state law. In that case plaintiff made arguments similar to Piercy in this case: that a municipality (in this case a county) derives its authority solely from the state legislature and that only annexations (in this case herd districts) complying with the conditions, restrictions, and limitations imposed by the state are valid. *Id.* at 825, 452 P.2d at 52.

The *Alexander* Court cited MCQUILLIN, MUNICIPAL CORPORATIONS, Vol. 2, § 7.09, holding that if the elements of estoppel are present, the owners of land over which a municipal corporation has exercised the powers and functions of government for a significant time will be estopped from questioning the location of municipal boundaries. *Id.* at 826, 452 P.2d at 53. The *Alexander* Court, citing *Finucane v. Village of Hayden*, 86 Idaho 199, 284 P.2d 236 (1963), with approval, noted that this rule is applied even though the municipal boundaries as extended are void when by reason of lapse of time municipal authority has been exercised, and there have resulted changed conditions involving extensive public and private interests. *Id.*

These holdings are based on public policy. Where the parties acquiesce in the action of public officials and transact business on the theory that the land is located with the boundaries of

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION– 20

the municipality, it is in the interest of the general public that such a rule be applied. *Id.* (citations omitted).

Lapse of time, while an important element, is not controlling in determining the applicability of a laches defense. *Finucane*, 86 Idaho at 206, 384 P.2d at 240. “Courts must accord due legal regard to all surrounding circumstances, and the acts of the parties in their relationship to the property involved in the controversy.” *Id.* (citations omitted).

In the *Alexander* case, Idaho Code § 50-303 provided, in pertinent part, that a municipality could only annex property “laid off into lots or blocks, containing not more than five acres of land each” *Alexander*, 92 Idaho at 824, 452 P.2d at 51. It was stipulated in the case that the plaintiff Alexander’s property was larger than five acres and technically was annexed in violation of 50-303. *Id.* at 823, 825, 452 P.2d at 50, 52. (“All parcels of property involved herein exceed five acres in size and all are devoted to agricultural uses.”)

In *Alexander*, more than two years had elapsed from the annexation to the time suit was filed. Plaintiffs were notified of the intent to annex and the annexation was accomplished. Plaintiffs knew their land would be annexed. Plaintiffs’ land benefitted through increased value and the elimination of hazardous health conditions. There was a correlative detriment to the municipality by expenditures of money to maintain the sewer system to which plaintiffs’ property was attached following annexation.

On these facts, the Idaho Supreme Court estopped the appellant in that case from arguing that the municipal boundaries were void.

Other jurisdictions have had similar holdings. For example, the Court of Appeals of Indiana held that the trial court did not abuse its discretion in finding that landowners' challenge to validity of city ordinance was barred by doctrine of laches. *Simon v. City of Auburn, Ind., Bd. of Zoning Appeals*, 519 N.E.2d 205 (Ind. Ct. App. 1988). In *Simon*, the Building Commissioner of the City of Auburn issued a building permit to Cedar Glen Joint Venture to construct two condominiums in the Auburn area. *Id.* at 206. Both Plaintiffs lived near the site in question and brought action against Defendants on the issue of whether under the Indiana Code a city's general zoning ordinance is legally valid when it purports to incorporate by reference a zoning map but no zoning map is included in the ordinance and no zoning map is on file in the city clerk-treasurer's office. *Id.*

The Court of Appeals held that the trial court did not abuse its discretion in finding that plaintiffs' claim was barred by the doctrine of laches. *Id.* at 215. The Court based its holding on the fact that plaintiffs did not initiate an action challenging the legal validity of the ordinance until nearly seventeen years after its enactment. *Id.* Furthermore, the Court held that plaintiffs were charged with knowledge of and acquiescence in the content of the zoning ordinance, and to allow plaintiffs to prevail would cause prejudice to defendants since defendants had already expended significant amounts of money on the development of the property at issue. *Id.* Lastly, the Court reasoned that to invalidate the ordinance would cause chaos, confusion and controversy to the City of Auburn, such that would hinder the economic growth and development of the entire area covered by the zoning ordinance. *Id.*

Similarly, the Supreme Court of New Jersey held that prosecutrix was barred from challenging the validity of an ordinance that was nine years old. *Benequit v. Borough of Monmouth Beach*, 125 N.J.L. 65, 67-68, 13 A.2d 847, 849 (N.J.1940). In *Benequit*, the prosecutrix was convicted of violating a zoning ordinance. *Id.* at 847. On appeal was the issue of whether the ordinance was invalid for the reason that it had not been published in a qualified newspaper as required by statute. *Id.* at 849.

In *Benequit*, the Court held that prosecutrix's complaint was barred by laches. *Id.* The Court reasoned that the ordinance had been in effect for over nine years and that presumably citizens had conformed to its provisions. *Id.* There was also evidence that the prosecutrix knew of the ordinance as evidenced by a letter sent to the defendant borough stating that she had purchased the property, that it was located in a zone wherein business was prohibited and applied 'for a special exception to the terms of the zoning ordinance permitting the above mentioned premises to be licensed for a first class hotel'. *Id.* At the time of sending the letter, prosecutrix did not attack the validity of the ordinance. *Id.* The Court held that even assuming that the ordinance was not published in a qualified newspaper, such irregularity was merely procedural and the prosecutrix under these facts and circumstances was guilty of laches, which estopped her from challenging the validity of the ordinance. *Id.*

Although "lapse of time" is not dispositive, in the instant case it should be. In determining whether the doctrine of laches applies, the Court must give "consideration . . . to all surrounding circumstances and acts of the parties." *Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996) (citations omitted, emphasis added). The time lapse between the enactment of

the 1982 herd district ordinance and this action is almost twenty-five years. Piercy has failed to show reasonable justification for the delay in challenging the ordinance. Essentially, the passage of twenty-five years demonstrates an implied waiver of the right to seek to invalidate the 1982 herd district ordinance by knowing acquiescence in a condition that had existed for so many years.

The alleged defects, which are primarily technical irregularities, were present and could have been discovered and challenged twenty-five years ago, before so many citizens of Canyon County had come to rely on the validity of the ordinance. Piercy challenges the ordinance only after one of his cattle caused a motor vehicle accident. To invalidate the 1982 herd district ordinance accomplishes Piercy's own individual purposes and would cause prejudice to the entire Canyon County community and more particularly, Plaintiffs.

Piercy challenges an ordinance that has been in effect for 25 years. When the ordinance was passed, neither Jennifer Sutton, Erika Rivera, nor Luis Guzman were even born. Glenn Koch, one of the commissioners who voted on the ordinance is 80 years old and cannot recall the details leading up to the passage of the ordinance. (*See* Affidavit of Glenn O. Koch in Opposition to Defendant Piercy's Motion for Summary Judgment previously filed July 20, 2007 ("Koch Aff.")). The other two commissioners who voted on the ordinance are dead. (*Id.* at ¶ 3.)

The entirety of Canyon County has followed the "fence in" rule of the herd district, as opposed to the "fence out" rule of open range, for 25 years. For 25 years Canyon County ranchers have had the responsibility to fence in their livestock to keep their stock off the road and off their neighbors' property. Piercy himself admits that all livestock in Canyon County, to his

knowledge, are either fenced in or contained by natural geographic barriers, such as rivers. This includes his own livestock.

At the time of the accident there were no “Open Range” warning signs or cattle warning signs along the road where the accident happened. (*See* Affidavit of Jennifer Sutton previously filed July 24, 2007, ¶ 5.) Ms. Sutton had seen such signs in other parts of Idaho before the accident and understood these signs to indicate that livestock might be in the roadway and that she should keep a lookout for cattle. (*Id.* at ¶ 6.) Jennifer Sutton did not expect any cattle on the road the night of this accident (*see id.* at ¶ 8), a product of the absence of these warning signs and the fact that she grew up in an area where ranchers were required by county ordinances to keep their cattle fenced in.

If ever public policy supported the application of estoppel by laches, this is the case. Generations of Canyon County residents, Canyon County governments, and Canyon County law enforcement, have assumed the entire county is in a herd district. They have ordered their behavior accordingly. It is too late for Piercy, having benefitted from the herd district status of Canyon County for 25 years, to now complain about alleged technical defects in the ordinance’s passage because he finds himself in this unfortunate case. He has had more than enough time to challenge herd district status and has not provided any reasonable justification for the delay in challenging the ordinance.

Last, because laches is an equitable doctrine, the Court is permitted to consider all the circumstances surrounding the issues raised by the parties. The Court can take into consideration the passage of time, fading of memories, and disappearance of evidence in determining whether

it is equitable to uphold the validity of the herd district ordinance. Piercy and Plaintiffs have submitted affidavits, two by Glenn Koch (one of the Canyon County Commissioners in 1982) and the clerk of the Canyon County District Court in 1982, Bill Straker. Neither can remember whether the ordinance was passed pursuant to a petition. (*See* Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment previously filed July 20, 2007, at 19.) Neither man can recall the details leading to passage of the ordinance. Two of the county commissioners who voted on the 1982 ordinance are dead. (*See* Koch Aff. at ¶ 3.)

This is precisely the type of situation laches is intended to avoid. Time has passed, memories have faded, and it is accordingly inequitable to force Guzman and Sutton to defend a 25-year-old ordinance based on incomplete county records, faded memories, and incomplete evidence. Equity firmly supports upholding this herd district under the doctrine of estoppel by laches.

The Court prevented Sutton from presenting evidence on the estoppel defenses even though there was no motion pending seeking to preclude entry of such evidence. Sutton requests that she be allowed to submit evidence supporting the estoppel defenses so that this issue may be decided on the merits.

2. Piercy's challenge to the 1982 herd district ordinance is barred by the doctrine of estoppel by waiver and/or quasi-estoppel.

Sutton joins, and incorporates herein by reference, the arguments of Plaintiff as expressed on pages 20-23 of Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment, filed with this Court on or about July 20, 2007, and the arguments in Plaintiffs' Memorandum in Support of Motion to Reconsider, filed with this Court on or about

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION— 26

November 8, 2007, including the transcript of a hearing before the Honorable Renae J. Hoff, in *Gazzaway v. E.G. Johnson Farms, Inc.*, Canyon County Case No. CV07-2141, attached thereto.

C. THE JUDGMENT ENTERED BY JUDGE PETRIE DATED JANUARY 21, 2009, CONTAINS A FACTUAL ERROR WHICH AFFECTS THE SCOPE OF THE JUDGMENT.

In the Judgment entered by Judge Petrie on January 21, 2009, holding the 1982 herd district ordinance invalid, the Court stated in its conclusion “[a]ccordingly, the court concludes no herd district existed at the location of the horrific accident involving Luis Guzman and Jennifer Sutton and Dale Piercy’s bull.” (Judgment at 12.) (Emphasis added.) The Court also ordered, adjudged and decreed that “2. Neither Plaintiff Luiz [sic] Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy’s bull in Canyon County in 2005.” (*Id.* at 13.) (Emphasis added.)

The Court’s decision was limited to determining the validity of the 1982 herd district ordinance, and did not address the validity of the 1908 herd district. While the bull escaped from an area included within the 1982 herd district, the collision occurred in a herd district established in 1908. Therefore, the Judgment is incorrect to the extent it is read to invalidate the 1908 herd district. Sutton requests that the Court’s Judgment be corrected, or clarified, accordingly.

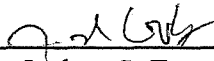
VI. CONCLUSION

Sutton respectfully requests that this Court grant her Motion for Reconsideration and uphold the validity of the 1982 herd district ordinance. Sutton also requests that this Court clarify and correct the factual error in the January 21, 2009, Judgment.

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON’S MOTION FOR RECONSIDERATION– 27

DATED this 30th day of July 2009.

ELAM & BURKE, P.A.

By: 
Joshua S. Evett, of the firm
Attorneys for Defendant

MEMORANDUM IN SUPPORT OF DEFENDANT JENNIFER
SUTTON'S MOTION FOR RECONSIDERATION- 28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July 2009, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Timothy C. Walton
Chasan & Walton, LLC
P.O. Box 1069
Boise, ID 83701-1069

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Stephen E. Blackburn
Blackburn Law, P.C.
660 East Franklin Road, Suite 220
Meridian, ID 83642

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Ryan B. Peck
Saetrum Law Offices
P.O. Box 7425
Boise, ID 83707

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Charles L. Saari
Canyon County Prosecutor
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

☐ U.S. Mail
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Joshua S. Evett
Joshua S. Evett

8-13 Ford

F I L E D
A.M. 500 P.M.

Rodney R. Saetrum, ISBN: 2921
 Ryan B. Peck, ISBN: 7022
 SAETRUM LAW OFFICES
 Post Office Box 7425
 Boise, Idaho 83707
 Telephone: (208) 336-0484

AUG 06 2009

CANYON COUNTY CLERK
 J HEIDEMAN, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,

Plaintiff,

v.

DALE PIERCY, individually, and JENNIFER
 SUTTON, individually,

Defendants.

Case No. CV05-4848

**SECOND AFFIDAVIT OF RYAN B.
 PECK IN SUPPORT OF MOTION
 FOR SUMMARY JUDGMENT**

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN,
 individually and JENNIFER SUTTON,
 individually,

Defendants.

COMES NOW, Ryan B. Peck, who first being duly sworn upon his oath and deposes and says as follows:

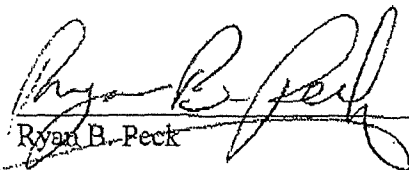
1. That I am a attorney for Saetrum Law Offices, who represents Defendant Dale Piercy, and I make this affidavit of my own personal knowledge;
2. Affiant attests that attached hereto as Exhibit A is a true and correct copy of the Judgment on behalf of Dale Piercy.

**SECOND AFFIDAVIT OF RYAN B. PECK IN SUPPORT OF MOTION FOR SUMMARY
 JUDGMENT - 1**

Further this affiant sayeth naught.

DATED this 6th day of August 2009.

By


Ryan B. Peck

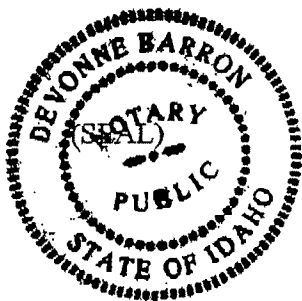
STATE OF IDAHO)


: ss.

County of Ada)

On this 6th day of August 2009 before me, Notary Public, personally appeared RYAN B. PECK, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.




Notary Public, State of Idaho
Residing at Nampa
My Commission Expires 8/12/2010

SECOND AFFIDAVIT OF RYAN B. PECK IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 2

EXHIBIT "A"

THIRD DISTRICT COURT OF IDAHO
COUNTY OF CANYON
JUDGMENT

FILED 11-23-09 AT 3:40p M.
CLERK OF DISTRICT COURT

BY [Signature] DEPUTY

State of Idaho vs.

Dale W Piercy

31367 Hwy 95

Parma ID 83660

D.L. #: NONE

D.O.B.: 12/28/1948

CASE #: CR-2005-0007773-C

CHARGE: CCO-3-5-17(2)A 31-714 Livestock At Large

AMENDED: Bond: _____

PROSECUTOR: _____

DEFENSE ATTORNEY: _____

INTERPRETER: _____

TAPE NO. _____

AGENCY: Canyon County Sheriffs Office CITATION:
160721

The Defendant, having been fully advised of his/her statutory and constitutional rights, including the right to be represented by counsel,
☐ pleaded guilty. ☐ was found guilty. ☒ was found not guilty.
☐ State moved to dismiss this charge. ☐ Charge is dismissed. ☐ Infraction default entered.
☐ Conviction is entered. ☐ Judgment is withheld.

JUDGMENT:

☐ The bond is ☐ exonerated. ☐ forfeited and case closed. ☐ to be applied to the fine and costs.
☐ No Contact Order ☐ dismissed. ☐ imposed as a term of probation.

PAYMENTS: Defendant shall pay immediately, or as provided in payment agreement, as follows:

\$ _____, which includes fine and court costs. \$ _____, suspended. To be paid
by _____ Pay \$ _____ per _____ to begin

☐ Reimburse for atty or P.D. \$ _____ by _____ / \$ _____ per month.
☐ \$ _____ restitution to _____

Make payments payable to Canyon County Clerk, include case number, and send to Restitution Office, 1115 Albany Street, Caldwell, ID 83605. Telephone: 454-7494 All installment payments are subject to a \$2.00 handling fee. Failure to pay your fine by the due date may result in your account being turned over to a collection agency.

JAIL: Defendant shall serve _____ days in jail with _____ days suspended and credit for _____ days served.

Defendant shall report to jail ☐ immediately ☐ on _____
☐ Work release / work search granted in all counties and Defendant shall report to jail immediately to make arrangements.
☐ Sheriff's Work Detail: _____ days in lieu of _____ days jail to be completed by _____ and Defendant shall report to jail immediately to make arrangements. If the Defendant fails to report to the jail as ordered or at a time agreed upon with the jail, or fails to satisfactorily perform the Defendant's obligations with the Sheriff Inmate Labor Detail, then the Sheriff is ordered and directed to place the Defendant in custody to serve the Defendant's jail time that has not been suspended.
This jail sentence is ☐ concurrent ☐ consecutive with any jail sentence previously ordered.

DRIVING PRIVILEGES suspended for _____ days/months beginning on

☐ the date of this Judgment. ☐ _____
☐ D.W.P.: The period of suspension shall commence following the end of any prior period of suspension, disqualification, or revocation existing at the time of this offense.

Reinstatement of driving privileges must be accomplished before you can drive. Apply to: Driver's Services, P. O. Box 7129, Boise, ID 83707-1129.

PROBATION: The Defendant shall be placed on ☐ supervised ☐ unsupervised probation for _____ months.

During the period of probation, all suspended penalties are subject to Defendant's compliance with all of the above orders and the following conditions. The Defendant shall:

☐ if on supervised probation, report to the Misdemeanor Probation Dept. within five days of this Order and comply with all rules and reporting requirements.
☐ not refuse evidentiary test for alcohol or drugs requested by a peace officer.
☐ keep Court informed in writing of Defendant's current mailing address and telephone number.
☐ not commit a felony or a misdemeanor. ☐ not violate conditions of No Contact Order.
☐ attend ☐ N.A. meetings for _____ weeks. ☐ A.A. meetings for _____ weeks and provide proof of completion to the Court by _____
☐ not consume alcohol and/or any other mood altering substance unless prescribed by a physician.
☐ not operate any motor vehicle upon a public roadway unless validly licensed and insured.
☐ not operate any motor vehicle after having consumed any quantity of alcohol. ☒ Interlock Device required
☐ perform _____ hours of community service for C.S.A. to be completed by _____ and pay all community service fees.
☐ within _____ days enroll in, and then promptly complete _____

☐ Payment schedule and/or terms and conditions of probation accepted.

Dated: 11/23/09 Signed: [Signature] Judge Judge No. 377

Copies to: ☒ Defendant ☐ Defense Attorney ☐ Misd. Prob. ☐ Dispatch
☐ Jail ☐ PreTrial Release ☐ Restitution ☐ Dr. Serv. ☐ Sup. Ct. ☐ Com. Ser. ☐ Counseling

JUDGMENT

1104

10/04

Rodney R. Saetrum, ISBN: 2921
Ryan B. Peck, ISBN: 7022
SAETRUM LAW OFFICES
Post Office Box 7425
Boise, Idaho 83707
Telephone: (208) 336-0484

F I L E D
A.M. 500 P.M.

AUG 06 2009

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,

Plaintiff,

v.

DALE PIERCY, individually, and JENNIFER
SUTTON, individually,

Defendants.

Case No. CV05-4848

**REPLY TO PLAINTIFF'S AND
CO-DEFENDANT SUTTON'S
OBJECTIONS TO DEFENDANT
PIERCY'S SECOND MOTION
FOR SUMMARY JUDGMENT**

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually,

Defendants.

COMES NOW the above-entitled Third Party Plaintiff Dale Piercy, by and through its counsel of record, and responds to Plaintiff's and Co-Defendant Sutton's Objections to Third Party Plaintiff Piercy's Second Motion for Summary Judgment.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 1**

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual background was provided in Mr. Piercy's original memorandum. In addition, the following facts and procedural background are relevant due to the objections made by Co-Defendant Sutton and Plaintiff Guzman.

At the time of the accident, Mr. Piercy was cited for violation of Canyon County Code §03-05-17. Mr. Piercy contested the citation in Canyon County Criminal Case No. CR-2005-7773. Mr. Piercy was found not guilty of this offense. (Affidavit of Ryan B. Peck, Exhibit A.)

For purposes of the Mr. Piercy's Second Motion for Summary Judgment, Mr. Piercy is not disputing that the accident occurred within a herd district created by an ordinance enacted in 1908 or that the 1908 herd district is valid.

There is also no dispute that there are no cattle guards or fences enclosing the 1908 herd district in particular at the border where Wamstad Road crosses over the Boise River.

II. STANDARD OF ADJUDICATION

The standard on summary judgment is set forth in Mr. Piercy's original memorandum and is not in dispute. The objections to Mr. Piercy's Second Motion for Summary Judgment require some additional analysis of laws regarding statutory interpretation.

The construction of a legislative act presents a pure question of law for this Court to decide. *Crawford v. Dept. of Corrections*, 133 Idaho 633, 635, 991 P.2d 358, 360 (1999). Courts also exercise free review over the interpretation of statutes. *Adamson v. Blanchard*, 133 Idaho 602, 605, 990 P.2d 1213, 1216, (1999)(construing Idaho Code § 25-2118 and Idaho Code § 25-2119 together as they were adopted at the same time.)

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 2**

"Courts are empowered to resolve ambiguities in statutes by ascertaining and giving effect to legislative intent." *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986) citing: *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951). "The act should be construed in its entirety and as a whole for the purpose of ascertaining the legislative intent, and where different sections reflect light upon each other they are regarded as *in pari materia*." *Id.*

The Idaho Supreme Court has also held, "'all parts of a statute should be given meaning,' and the Court 'will construe a statute so that effect is given to its provisions, and no part is rendered superfluous or insignificant.'" *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007) citing: *Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 226, 108 P.3d 370, 373 (2005).

III. Legal Analysis

Mr. Piercy is immune from liability in this lawsuit because: (1) this Court ruled that Mr. Piercy's bull was being pastured in an open range area; (2) I.C. § 25-2118 in conjunction with Idaho range law and I.C. § 25-2402, create immunity for Mr. Piercy's bull being in the 1908 herd district; and (3) Mr. Piercy cannot be held civilly liable under Canyon County Ordinance 03-05-17.

I. Mr. Piercy's Bull was Being Pastured in an Open Range Area

Based upon this Court's decision from the trial on Mr. Piercy's Amended Declaratory Judgment Action the 1982 herd district ordinance was invalid, and therefore, the area upon which Mr. Piercy pastured his bull is open range. (Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial.) Mr. Piercy is aware that Plaintiff Guzman and Co-Defendant Sutton are attempting to revisit this Court's decision, but that is a separate motion. (See: Response to Motions to Reconsider Prior Court Rulings and Motion for Sanctions)

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 3**

II. Mr. Piercy is Immune from Liability in the 1908 Herd District

Mr. Piercy is protected from liability by the open range laws and policy of Idaho as expressed in Idaho Supreme Court cases and the Idaho Code.

Idaho has always been a state that follows the 'fence out' rule of open range. *Moreland v. Adams*, 143 Idaho 687, 689, 152 P.3d 558, 560 (2007). The 'fence out' rule places upon landowners the duty to construct fences to keep open range cattle from entering their property. *Id.* After the enactment of legal fence laws, landowners in open range areas could hold another landowner liable if they enclosed their property in a legal fence. Then, if a cattle owner's livestock broke through the fence, the owner of the cattle could be liable to the landowner.

The Idaho Legislature later made it possible for landowners to impose the 'fence in' rule in certain areas by creating a herd district. *Id.* The 'fence in' rule makes it the responsibility of cattle owners to enclose their animals.

The Idaho Legislature enacted I.C. § 25-2118 and I.C. § 25-2119 in 1961. These statutes were enacted to specifically address the liability of livestock on a highway. Idaho Code § 25-2118 specifically addresses the liability to an owner regarding cattle upon a highway in an open range area. Idaho Code § 25-2119 generally deals with livestock on highways in herd district areas. Neither of these statutes specifically addresses the issue of an open range cow that wanders into an unenclosed herd district.

Two years later in 1963, the Idaho Legislature filled the gap between I.C. § 25-2118 and I.C. § 25-2119, by enacting a revision to I.C. § 25-2402 which "exclude[s] liability for livestock roaming into a herd district from open range unless the district is inclosed by a lawful fence." *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986). The Idaho Supreme Court

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 4**

interpretation of the Idaho Legislature's intent in amending I.C. § 25-2402 is controlling in this case. Further, it is supported by the common law of Idaho. Essentially, I.C. § 25-2402 as amended in 1963 reasserts the 'fence out' rule regarding boundaries between herd districts and open range.

Without this rule, the designation of open range becomes meaningless. It is well settled that one of the policies of open range is to save owners of livestock the expense of maintaining fences around their property. If a livestock owner in open range were liable for livestock that wandered into an adjacent herd district, then the livestock owner would be required to fence the border between open range and the herd district area. This would run precisely contrary to the longstanding 'fence out' rule of open range.

A herd district neighbor is also required to 'fence out' from open range livestock. The amendment of I.C. § 25-2402 in 1963 made it clear that it was the Idaho Legislature's intent that the common law 'fence out' rule applied whether the neighbor was a single landowner or a herd district. The cost to maintain a fence around the herd district is the responsibility of the landowners within the herd district as indicated by the provisions of I.C. § 25-2402-2408, which allow for the taxing of landowners in a herd district to construct a fence enclosing the herd district.

Co-Defendant Sutton argues that the 1908 herd district is exempt from the 'fence out' rule. This argument is based upon the idea that the amendment to I.C. § 25-2402 came in 1963, and therefore, does not apply to the 1908 herd district. This argument would not only run contrary to the long-standing 'fence out' rule of open range, but would make the statutes regarding open range meaningless. The Idaho Supreme Court has held that, "all parts of a statute should be given meaning," and the Court 'will construe a statute so that effect is given to its provisions, and no part

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 5**

is rendered superfluous or insignificant.” *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007) citing: *Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 226, 108 P.3d 370, 373 (2005).

Almost all herd districts in Canyon County, and in other counties in this state, were created prior to 1963. This Court has been provided with all the herd district ordinances in Canyon County and with the exception of the invalid 1982 ordinance, they were all passed prior to 1963. Therefore, if all herd districts created prior to 1963 were exempt from the ‘fence out’ rule with regard to open range livestock, then all the statutes governing open range would be meaningless. Even those livestock owners within open range would have to fence in their livestock or construct and maintain a fence around the entire open range area for fear their livestock would roam into a herd district that was not created after 1963. This would nullify the open range statutes designed to protect owners of livestock in open range.

The Idaho Supreme Court in *Easley*, stated that the intention of the Idaho Legislature was to “exclude liability for livestock roaming into a herd district from open range.” *Easley v. Lee*, 111 Idaho 115, 118, 721 P.2d 215, 218 (1986). Idaho law is designed to maintain the protections of open range by enforcing the ‘fence out’ rule with any landowner in open range or herd district bordering open range despite when it was created.

III. Mr. Piercy Cannot be Negligent Per Se under Canyon County Ordinance 03-05-17

Canyon County Ordinance 03-05-17 only provides a criminal penalty and cannot be used to support a civil claim of negligence. Canyon County Code 03-05-03, “Purpose and Authority”, states in pertinent part, “This article is also designed to help solve the problems caused by ‘livestock’, . . . from running at large in the county.” Both sections 03-05-17 (2) and (4) state that

**REPLY TO PLAINTIFF’S AND CO-DEFENDANT SUTTON’S OBJECTIONS TO
DEFENDANT PIERCY’S SECOND MOTION FOR SUMMARY JUDGMENT - 6**

"it shall be unlawful" for livestock (subsection 2) and animals (subsection 4) for animals to be at large on county roads, and section 03-05-29 (1) states that "violations of the provisions of this article shall be a misdemeanor and shall be punished as set forth in Idaho Code 18-113". In other words, Canyon County has made it a misdemeanor crime to have livestock or other defined animals at large on the roads of the county.

This is a similar approach taken by the Benewah County Commissioners which was discussed in *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Com'rs of Benewah County*, 105 Idaho 209, 668 P.2d 85 (1983). In *Benewah County*, the county commissioners enacted an ordinance which prohibited livestock running at large in the county. As noted by the Supreme Court of Idaho, "The ordinance expressly leaves unaffected civil liability arising from trespassing livestock." *Id.* at 211, 688 P.2d at 87, *see also* 105 Idaho 213, 214, 688 P.2d 89, 90.

While agreeing that Canyon County validly exercised its police power to create the above sections of its Code, the status of this ordinance is similar to that found in *Benewah County* which precluded civil liability for violation of the ordinance. As a result of the *Benewah County* decision, a livestock owner could be criminally liable for violation of the county ordinance by allowing his livestock to run at large within Benewah County, but would not be civilly liable should that livestock be hit by a vehicle and cause damages because the livestock was in open range and I.C. § 25-2118 coupled with I.C. § 25-2402 provides complete immunity. Co-Defendant Sutton and Plaintiff Guzman cannot rely on the *Benewah* case for the proposition that Mr. Piercy is negligent because state statute specifically provides civil immunity for Mr. Piercy.

It is the same with the present case and the above Canyon County Code sections. Canyon County has made it a misdemeanor crime to have livestock running at large within the county.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 7**

However, for those portions of the county still in "open range" status, such as where Defendant Piercy resides, there is no civil liability for any damages caused by livestock running at large under sections 25-2118 and 25-2402.

A Canyon County ordinance cannot place liability upon a person who is specifically free from liability under State Statute. It would be absurd to hold that a county has more power than the Idaho Legislature.

Mr. Piercy was cited for violation of Canyon County Ordinance 03-05-17. Mr. Piercy contested the charge and was found not guilty. As discussed, there is no civil penalty for a violation of this ordinance where a party is provided immunity by Idaho State statute.

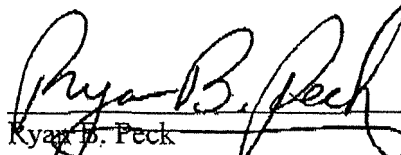
III. CONCLUSION

Mr. Piercy is immune from liability in this lawsuit under Idaho common law, I.C. § 25-2118 in conjunction with I.C. § 25-2402. Mr. Piercy requests that this Court grant summary judgment on his behalf.

DATED this 6th day of August 2009.

SAETRUM LAW OFFICES

By


Ryan B. Peck
Attorneys for Plaintiff

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 8**

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of August 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

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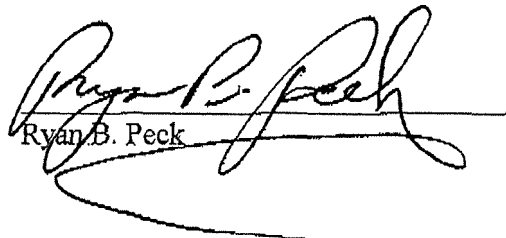
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Ryan B. Peck

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 9**

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FILED
8:30 A.M. 8:13 P.M.
✓ AUG 07 2009 813 Ford
CANYON COUNTY CLERK
C. DYE, DEPUTY

Attorneys for Defendant Dale Piercy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN, individually,

Plaintiff,

v.

DALE PIERCY, individually, and JENNIFER
SUTTON, individually,

Defendants.

Case No. CV05-4848

**RESPONSE TO MOTIONS TO
RECONSIDER PRIOR COURT
RULINGS AND MOTION FOR
SANCTIONS**

DALE PIERCY, individually,

Plaintiff,

CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually,

Defendants.

COMES NOW the above-entitled Defendant Dale Piercy, by and through its counsel of record, and responds to Co-Defendant Sutton's Motion for Reconsideration and the elements of Plaintiff Guzman's Objection to Defendant Piercy's Second Motion for Summary Judgment that

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 1**

were essentially a motion to reconsider.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual background was provided in Mr. Piercy's original memorandum in support of his Second Motion for Summary Judgment. In addition, the following facts and procedural background are relevant due to the motions for reconsideration being asserted.

This case began as a lawsuit against Mr. Piercy on May 10, 2005. Mr. Piercy raised the issue of the validity of the 1982 herd district as an affirmative defense in his Answer filed on June 20, 2005. Mr. Piercy then pursued the issue of the validity of the 1982 herd district as a motion for summary judgment on May 5, 2007. As part of the Court's ruling on Mr. Piercy's motion for summary judgment issued October 9, 2007, the Court ordered that Ms. Sutton bring in Canyon County as a party in the action. Ms. Sutton complied by filing an Action for Declaratory Relief against Canyon County on October 16, 2007. Canyon County filed its Answer on November 8, 2007, but did not plead a statute of limitations defense. Mr. Guzman did not file any pleading in response to the Action for Declaratory Relief.

Mr. Guzman filed Plaintiffs' Motion to Reconsider on November 7, 2007. Mr. Guzman was seeking to have this Court specifically rule on Mr. Guzman's and Ms. Sutton's arguments regarding equitable estoppel, estoppel by laches and quasi-estoppel. Since Mr. Guzman had made this a matter a summary judgment in response to Mr. Piercy's motion for summary judgment this was essentially a motion for summary judgment on these issues.

Mr. Piercy responded by filing Defendant Piercy's Objection to Plaintiff's Motion to Reconsider. This motion was supported by subsequent briefing filed by Mr. Guzman on March 26, 2008 and a response by Mr. Piercy on March 28, 2008. This Court ruled by Memorandum

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 2**

Decision filed on April 3, 2008. The Court ruled that Mr. Piercy was not estopped from moving forward on the challenge to the 1982 herd district.

In order to simplify the pleadings the parties entered into and filed a Stipulation to Amend Pleadings and Scheduling on September 3, 2008. This stipulation included the following provision: "That Canyon County, Mr. Guzman and Ms. Sutton waive any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief."

The Amended Action for Declaratory Relief was filed by Mr. Piercy on September 10, 2008. Mr. Guzman filed his Answer on September 18, 2008. Mr. Guzman pled a statute of limitations defense as an affirmative defense. Ms. Sutton filed her Answer on September 23, 2008. Ms. Guzman pled a statute of limitations defense as an affirmative defense. Canyon County filed its Answer on September 24, 2008. Canyon County *did not* plead a statute of limitations defense.

A trial was had on October 8, 2008. At the trial, Ms. Sutton attempted to introduce evidence regarding the estoppel issues. (R. at 160-168.) Mr. Piercy objected to the evidence being introduced based upon the Court's prior ruling on these issues. *Id.* The Court agreed that the issue had been determined and the proof Ms. Sutton desired to introduce was not going to make a difference. *Id.*

II. STANDARD OF ADJUDICATION

Summary judgment under I.R.C.P. 56(c) can be granted by a trial court when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986). In ruling on a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. All reasonable inferences of fact must be drawn in favor of the nonmoving party.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 3**

G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). Additionally,

The burden of proving the absence of material facts is upon the moving party.

Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. The nonmoving party may not rest upon the mere allegations or denials contained in the pleadings, but must come forward and produce evidence by affidavits or as otherwise provided in the rules to set forth specific facts showing that there is a genuine issue for trial (citations omitted).

Levinger v. Mercy Medical Center, Nampa, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003) (parenthesis added). The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Thompson v. City of Lewiston*, 137 Idaho 473, 475-76, 50 P.3d 488, 490-91 (2002).

III. LEGAL ANALYSIS

This Court should deny Ms. Sutton's and Mr. Guzman's motions to reconsider various aspects of the previous Judge's rulings because: (1) they have waived any statute of limitation defenses; (2) they are judicially estopped from taking contrary positions; and (3) the estoppel claims are without merit. Further, regarding the statute of limitations defenses and certain assertions by the other parties, Mr. Piercy requests this Court to grant sanctions against the other parties for making frivolous and unfounded arguments.

A. No Statute of Limitation Bars Mr. Piercy's Claim

In order to analyze this defense, it is important to pay special attention to the above procedural history of this matter.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 4**

Ms. Sutton spent considerable space in their briefing arguing that Mr. Piercy's declaratory action is barred by a statute of limitations. These are precisely the same arguments made by Ms. Sutton in her closing arguments to the Court following the trial of this matter. These arguments are moot because Canyon County did not raise or argue for a statute of limitations defense.

Idaho Rule of Civil Procedure 8(c) states: "In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations" Idaho Rule of Civil Procedure 9(h) states: "In pleading the statute of limitations it is sufficient to state generally that the action is barred, and allege with particularity the Session Law of the section of the Idaho Code upon which the pleader relies."

The Idaho Court of Appeals has held that, "Under the civil rules, compliance with the governing statute of limitations is not a requirement for subject matter jurisdiction; rather, the time bar of the statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant." *Anderson v. State*, 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct.App. 1999).

Canyon County waived any statute of limitation defense it had by failing to plead the defense in answer to either the Action for Declaratory Relief or the Amended Action for Declaratory Relief. Canyon County has still not made any argument regarding statute of limitations. Therefore, Mr. Guzman's and Ms. Sutton's attempt to raise a last minute statute of limitations defense is moot. Any ruling by the Court will bind Canyon County and a ruling that the 1982 herd district is invalid will be the law in Canyon County. This ruling will, therefore, apply to Mr. Guzman's underlying action against Mr. Piercy.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 5**

1. Mr. Guzman and Ms. Sutton Waived any Statute of Limitation Defenses

Mr. Guzman and Ms. Sutton waived any statute of limitation defense both by agreement of the parties and by failing to timely assert the defenses. Neither Mr. Guzman nor Ms. Sutton raised statute of limitations arguments prior to impermissibly including them in their Answers to Mr. Piercy's Amended Action for Declaratory Relief. The Action for Declaratory Relief was filed on October 16, 2007. The declaratory action was originally filed by Ms. Sutton and she did not raise a statute of limitations defense.

In fact, it was Ms. Sutton that argued in response to our original motion for summary judgment that Canyon County was a necessary party and must be joined in this matter. It was based upon Ms. Sutton's arguments that the Court ordered Ms. Sutton to join Canyon County. Ms. Sutton filed a declaratory action. Ms. Sutton did not raise any statute of limitations defense.

Similarly, Mr. Guzman did not respond to the Action for Declaratory Relief. This has been an issue in the case for over a year and both Ms. Sutton and Mr. Guzman have failed to raise a statute of limitations defense.

Finally, the parties determined that it made better sense to have Mr. Piercy be the Plaintiff in the declaratory action. After some discussion, Mr. Piercy agreed that Mr. Guzman and Ms. Sutton could be defendants in the action so that they could appropriately appear at the trial of this matter. Partially in exchange for that concession, the attorneys for Ms. Sutton and Mr. Guzman signed the stipulation agreeing to waive any defenses that resulted from the timing of the filing of the Amended Action for Declaratory Relief. This provision of the stipulation includes any statute of limitation defenses.

Mr. Guzman and Ms. Sutton both voluntarily waived any statute of limitations defenses, but also waived them through not raising them timely.

2. The Statute of Limitations Defenses do not Have Merit

Finally, the statute of limitation defenses raised by Mr. Guzman and Ms. Sutton do not have merit in that one is inapplicable and the other is not available in this type of case.

Ms. Sutton raises the defense under I.C. § 5-221. This provision is not applicable as Mr. Piercy is not making a claim against Canyon County. Mr. Piercy is asking the Court to declare that the 1982 herd district ordinance was invalid and void. I.C. § 5-221 is clearly a tort claim limitation. The one case cited by Ms. Sutton even suggests that this is a tort claims provision. Further, Ms. Sutton does not have standing to argue a defense that would only be a defense for Canyon County. Canyon County itself has not raised this defense.

Mr. Guzman and Ms. Sutton also make a claim under I.C. § 5-224. This provision was not designed to bar claims that a ordinance is invalid. If one wishing to contest an ordinance only had four years until being barred, then the case of *Brown v. Board of Education* would never have been litigated. Also unjust voting laws would have been protected under the guise of claims being stale.

Further, this is an action that includes proof that the Canyon County Commissioners failed to give proper notice to the citizens of Canyon County. This is unlike the *Canady* case, where the Plaintiff had knowledge of the case and its effect prior to the action taking place. The Plaintiff watched as the lumber company expended a lot of resources in reliance upon the city's actions. This is not so with Mr. Piercy. Canyon County failed to give the required notice and prejudiced Mr. Piercy's ability to respond to the proposed action.

The statute of limitations arguments are moot, waived or not applicable.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 7**

3. Sanctions Should be Rendered Against Ms. Sutton and Mr. Guzman for Arguing These Defenses

This issue is so clear that it is frivolous to bring this matter to the Court's attention at this time. It has wasted several hours of counsel's time to respond to these arguments. This is certain where all parties specifically agreed to not raise defenses based upon the timing of the filing of Amended Action for Declaratory Relief and yet violated their agreement using up the Court and counsel's time on these arguments.

B. Mr. Piercy is not Estopped from Arguing the Validity of the 1982 Herd District.

Ms. Sutton and Mr. Guzman make the exact same arguments regarding estoppel by laches, quasi-estoppel and equitable estoppel as were presented before Judge Petrie. This Court should review the previous briefing by Mr. Piercy in this matter including the Memorandum in Support of Defendant Piercy's Motion for Summary Judgment filed May 1, 2007 and accompanying affidavits, along with the briefing filed on July 9, 2007; July 30, 2007; August 9, 2007; August 23, 2007; December 3, 2007 and March 28, 2008. This Court should also closely examine Judge Petrie's order on these issues filed April 3, 2008. After all the previously mentioned briefing and Judge Petrie's order, Ms. Sutton and Mr. Guzman are once again trying to revive their estoppel claims. As this Court will see, Ms. Sutton and Mr. Guzman have not provided any evidence to support certain of the elements of any of these equitable doctrines.

1. Ms. Sutton and Mr. Guzman Have Failed to Provide Evidence to Support their Claim of Estoppel by Laches

The doctrine of estoppel by laches does not prevent Defendant Piercy from challenging the 1982 herd district. In their briefing Ms. Sutton and Mr. Guzman fail to even cite the actual

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 8**

elements of estoppel by laches.

The Idaho Supreme Court has held:

Like quasi-estoppel, laches is an affirmative defense and the party asserting the defense has the burden of proof. Whether or not a party is guilty of laches is a question of fact. (citation omitted). The necessary elements to maintain a defense of laches are:

(1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Henderson v. Smith, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996). (citation omitted). Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties. (citation omitted). The lapse of time alone is not controlling on whether laches applies. (citation omitted).

Thomas v. Arkhoosh Produce, Inc., 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002). The only evidence provided is that Mr. Guzman, Ms. Rivera, Ms. Sutton and some police officers thought that it was illegal for cows to be on the roadway. These beliefs have no bearing on any of the elements of laches.

First, there must be an invasion of the rights of the non-moving party by the moving party. Mr. Piercy has never asserted that Mr. Guzman or Ms. Sutton invaded any of his rights. The rights to a person in open range is immunity from liability when a car collides with their livestock. The elements of laches requires proof of a previous invasion of rights, not an invasion of rights if the Court does not grant the relief requested by the non-moving party. Therefore, Mr. Guzman's and Ms. Sutton's claim of laches violates the first element of a claim of laches.

The second element involves a delay in asserting a right. Defendant Piercy's right to immunity from liability did not even arise until Mr. Guzman and Ms. Sutton had the accident

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 9**

involving his animal. Mr. Piercy asserted his right to immunity from liability in his Answer to Plaintiffs' Complaint. Mr. Piercy immediately asserted his rights in this matter. Mr. Guzman and Ms. Sutton have not provided any evidence to the contrary.

Mr. Guzman and Ms. Sutton have also not provided any evidence concerning the third element of laches, which requires that they prove that Ms. Sutton and Mr. Guzman had no knowledge that Mr. Piercy would assert his rights. Ms. Sutton and Mr. Guzman had knowledge from the instigation of this lawsuit that Mr. Piercy was planning to assert his rights.

Essentially, Mr. Guzman and Ms. Sutton are relying on the passage of time to base their arguments. The *Thomas* case states that this is not a sole basis for granting this affirmative defense. In fact, the Supreme Court of Idaho upheld a Trial Court's ruling to invalidate a 66-year-old ordinance. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir and Canal Co.*, 123 Idaho 634, 851 P.2d 348 (1993). This case states that despite evidence that the movant had relied on the state of the law for 66 years, was not evidence enough to establish laches. *Id.* at 637. 851 P.2d 348, 351.

Mr. Guzman and Ms. Sutton often make global assertions such as "The entirety of Canyon County has followed the "fence in" rule of the herd district . . . , for 25 years", and that "Piercy has benefitted from herd district status, as his lands have not been subject to depredations from the at large cattle of his neighbors." (Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment at 14-15.) These assertions, however, are without any evidence. Mr. Guzman and Ms. Sutton have not provided any proof to establish that the doctrine of laches should apply. It is simply not applicable in this case.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 10**

2. Mr. Guzman and Ms. Sutton Failed to Provide any Evidence to Support Their Claims of Equitable or Quasi – Estoppel

Neither the Mr. Guzman nor Ms. Sutton's memorandums past or present regarding these issues set forth the actual elements they must prove in order to establish a defense of quasi-estoppel.

A cursory look at the elements of estoppel shows Mr. Guzman's and Ms. Sutton's lack of evidence to support the defense of quasi-estoppel. The Idaho Supreme Court has held:

The doctrine of quasi-estoppel "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." (Citation omitted). This doctrine applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. (Citation omitted).

Atwood v. Smith, 143 Idaho 110, 138 P.3d 310 (2006).

The first element requires that a party asserting quasi-estoppel prove that the offending party took a contradictory position to that party's current position. The case law cited by Mr. Guzman, although much older than the more current *Atwood* case, states the same requirement. "The requirements for proper application of quasi estoppel are, then, that the person against whom it is sought to be applied has previously taken an inconsistent position, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine." *KTVB, Inc. v. Boise City*, 94 Idaho 279, 282, 486 P.2d 992, 995 (1971). Unless it is established that a party has taken a contrary position then they cannot be held barred under the doctrine of quasi-estoppel, despite their knowledge of, benefit from or acquiescence in an action.

The other elements of quasi-estoppel are only relevant if Mr. Guzman and Ms. Sutton can

first prove there is no genuine issue of fact upon whether Mr. Piercy took a contrary position to the position he is currently asserting. Mr. Guzman has not provided any real evidence that Mr. Piercy either thought that the land in question was a herd district or that he ever took that position. Mr. Piercy's second affidavit in support of summary judgment states that he has always thought that the land where the bull came from was in open range. This testimony is not contradicted by any other testimony. Mr. Guzman and Ms. Sutton have utterly failed to provide any evidence to prove this element of quasi-estoppel. Mr. Piercy has always believed that his pasture was in open range and has never contradicted that position.

The only fact Mr. Guzman can positively assert is that prior to this lawsuit Mr. Piercy did not challenge the 1982 ordinances affect upon his land. The Idaho Appellate Court upheld a Trial Court's decision that such evidence as stated above was insufficient to apply the doctrine of equitable estoppel. *Winn v. Eaton*, 128 Idaho 670, 675, 917 P.2d 1310, 1315 (Id.App. 1996). The Court held that the Defendants asserting equitable estoppel did not meet their burden of proof regarding equitable estoppel. *Id.* The Defendants alleged in an easement case that because the Plaintiffs lived forty feet behind them and shared a driveway that they were well aware of what Defendants were doing in staking out their property. The Defendant also cited that it was only after Defendants had completed building their home that Plaintiffs attempted to assert their rights. The Court stated that such silence before the trial on the issue is not evidence that Plaintiffs took a contrary position prior to the action they were pursuing. *Id.*

The essence of all Mr. Guzman's and Ms. Sutton's arguments in regard to the present case is that Mr. Piercy had not previously challenged the 1982 ordinance. As in *Winn*, this type of evidence is not sufficient to prove that Mr. Piercy ever took a contrary position to what he is

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 12**

currently asserting. Mr. Piercy was not aware prior to this lawsuit that anyone was claiming that his land was not open range with regard to cattle or otherwise.

Further, Mr. Piercy did not gain any benefit from the land purportedly being in a herd district. The affect of a herd district is to potentially expose Mr. Piercy to legal liability. Mr. Guzman and Ms. Sutton have not provided any evidence to suggest that Mr. Piercy has gained any special benefit from the 1982 ordinance, which did not even include cattle as an animal to be limited from free roaming. Mr. Guzman and Ms. Sutton rely on unsupported assertions that Mr. Piercy would benefit from his land being in a herd district.

Mr. Guzman and Ms. Sutton cite Defendant Piercy's deposition regarding his understanding of the state of fencing in Canyon County to support their estoppel arguments. The existence or non-existence of fencing is not relevant to the issues of estoppel or whether there is a herd district. Neither Mr. Guzman nor Ms. Sutton have provided any evidence to suggest that there would not be any fencing in Canyon County if the small area allegedly affected by the 1982 ordinance were open range versus a herd district. Cattlemen fence in their livestock whether they are in open range or not.

The affidavits provided by Mr. Guzman and Ms. Sutton merely state that they thought it was illegal to have cows on the road. They do not even assert that they thought a herd district existed. These vague statements could just as likely be referring to knowledge of the criminal statute not the 1982 ordinance. The reliance of the Plaintiffs in this matter on what they thought was the law is not relevant to the elements of quasi-estoppel. The affidavits from the Plaintiffs are irrelevant. In short Plaintiffs have provided no evidence that Defendant Piercy should be estopped from arguing that the 1982 ordinance did nothing to affect the subject land's open range status.

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 13**

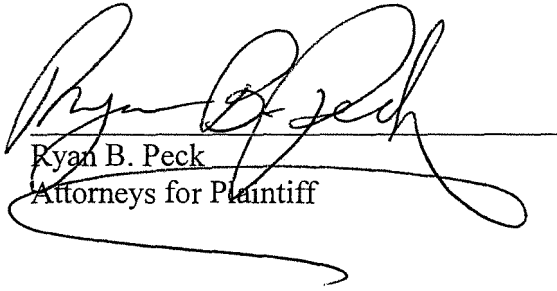
IV. CONCLUSION

Mr. Guzman and Ms. Sutton have not provided any new law or evidence suggesting that this Court should review the decisions made by the previous judge. It is a waste of time and judicial resources to revisit every argument made during several years of litigation simply because a judge retired and Ms. Sutton and Mr. Guzman want to throw everything out there again. This Court has the discretion to simply deny their motion to reconsider and move this litigation forward. Mr. Piercy requests this Court to deny the motions to reconsider.

DATED this 6th day of August 2009.

SAETRUM LAW OFFICES

By



Ryan B. Peck
Attorneys for Plaintiff

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 14**

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of August 2009, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

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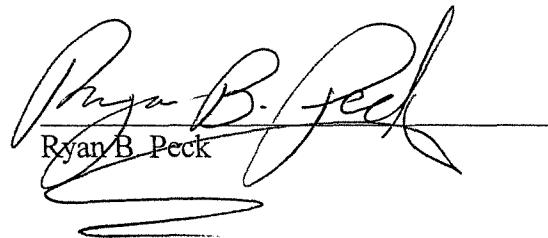
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Ryan B. Peck

**REPLY TO PLAINTIFF'S AND CO-DEFENDANT SUTTON'S OBJECTIONS TO
DEFENDANT PIERCY'S SECOND MOTION FOR SUMMARY JUDGMENT - 15**

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F I L E D
 A.M. 1:30 P.M.
AUG 11 2009
 CANYON COUNTY CLERK
 D. BUTLER, DEPUTY

Attorneys for Plaintiff Luis J. Guzman

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN,

Plaintiff,

vs.

DALE W. PIERCY, individually and
 JENNIFER SUTTON individually,

Defendants.

DALE PIERCY, individually,

Plaintiff,

vs.

CANYON COUNTY, LUIS GUZMAN,
 Individually and JENNIFER SUTTON,
 Individually,

Defendants.

Case No: CV05-4848

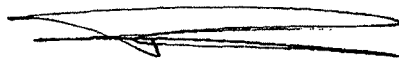
**PLAINTIFF/DEFENDANT, LUIS
 J. GUZMAN'S MOTION FOR
 RECONSIDERATION**

Comes now Luis J. Guzman, Plaintiff in the above-entitled tort action, and Defendant in the above-entitled Declaratory Judgment action, and hereby joins in Defendant Jennifer Sutton's Motion for Reconsideration. Specifically, Guzman moves this court to reconsider the Order on Motion to Reconsider dated April 30, 2009, and the Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial dated January 21, 2009, on the grounds and for the reasons that the same are contrary to the law and the facts of this case as set forth more fully in Sutton's Memorandum in Support of Motion to Reconsider, including the arguments expressed by Guzman in Plaintiffs' Memorandum in Opposition to Defendant Piercy's Motion for Summary Judgment filed with this Court on or about July 20, 2007, and the arguments in Plaintiffs' Memorandum in Support of Motion to Reconsider, filed with this Court on or about November 8, 2007, and for the reasons specified in Plaintiff Guzman's Memorandum in Opposition to Defendant Piercy's Second Motion for Summary Judgment filed with this court on or about May 22, 2009.

This Motion is based upon the files and records in this action, the evidence presented to and cited to the court in this action and the pleadings filed by the parties in this action (including both the pleadings in the underlying tort action and the declaratory judgment action).

DATED this 11 day of August, 2009.

Chasan & Walton, LLC



Timothy C. Walton, Attorney for
Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11 day of August, 2009, a true and correct copy of the above and foregoing document was served upon by:

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Attorneys for Defendant Jennifer Sutton

FILED
 8/10 A.M. P.M.

AUG 12 2009 ✓

CANYON COUNTY CLERK
 D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN,

Plaintiff,

v.

DALE PIERCY, individually and
 JENNIFER SUTTON, individually,

Defendants.

DALE PIERCY, individually,

Plaintiff,

vs.

CANYON COUNTY, LUIS GUZMAN,
 individually and JENNIFER SUTTON,
 individually,

Defendants.

Case No. CV05-4848

REPLY BRIEF IN SUPPORT OF
 DEFENDANT SUTTON'S MOTION FOR
 RECONSIDERATION

REPLY BRIEF IN SUPPORT OF DEFENDANT SUTTON'S
 MOTION FOR RECONSIDERATION - 1

This is obviously a complicated case. Unfortunately, because of Judge Petrie's departure from the bench immediately following issuance of his Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial (filed January 21, 2009), there was no time to request reconsideration.

In spite of outward appearances, the relief requested by Defendant Sutton is not that complicated, and the relief requested certainly does not warrant the imposition of sanctions, which Piercy has requested without citation to legal authority.

Defendant Sutton replies, briefly, as follows, regarding each issue before the Court:

1. Error in the Judgment

Piercy has not addressed Defendant Sutton's point that the Judgment entered by the Court contains a factual error. The Court stated in its conclusion "[a]ccordingly, the court concludes no herd district existed at the location of the horrific accident involving Luis Guzman and Jennifer Sutton and Dale Piercy's bull." (Judgment at 12.)(Emphasis added.) The Court also ordered, adjudged and decreed that "2. Neither Plaintiff Luiz [sic] Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy's bull in Canyon County in 2005." (*Id.* at 13.) (Emphasis added.)

The herd district at issue in the declaratory relief action before Judge Petrie was the 1982 herd district where Piercy's bull was pastured. That is the herd district Judge Petrie struck down. (*See, e.g.,* Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial, pp. 2-5 (referring to 1982 herd district).)

REPLY BRIEF IN SUPPORT OF DEFENDANT SUTTON'S
MOTION FOR RECONSIDERATION – 2

None of the parties dispute, however, that the accident involving Sutton, Guzman, and Rivera occurred in the 1908 herd district, which is across the Boise River from the 1982 herd district. For the reasons set forth in Sutton's Opposition to Piercy's Second Motion for Summary Judgment, filed May 22, 2009, it is critical that the Court correctly identify the 1982 herd district (now adjudicated to be open range) from which the bull escaped, and the 1908 herd district (and still a herd district) in which the accident occurred. Idaho Code § 25-2401(1), which was enacted in 1963, is not retroactive, and does not vitiate the status of a herd district into which animals from open range pass.

There is no indication in Judge Petrie's decision that he analyzed whether the fact that the accident occurred in the 1908 herd district - *which remains valid to this day* - has any bearing on the case.

This Court must correct the factual inaccuracies in the Judgment. Defendant Sutton also requests that the Court analyze whether the fact that the accident occurred in the 1908 herd district changes the outcome of the case. While it very well may not, it will be immeasurably important to the parties for the purpose of evaluating the case for further handling, including an appeal.

2. Defendant Sutton Requests that this Court Permit Her to Submit Evidence on her Estoppel by Waiver and Quasi Estoppel Defenses

Defendant Sutton's point regarding these defenses is simply that she ought to be allowed the opportunity to submit evidence supporting these defenses in a declaratory relief setting. (*See* Memorandum in Support of Defendant Jennifer Sutton's Motion for Reconsideration, p. 26 (requesting that this Court allow her to present evidence supporting these defenses).) Judge

Petrie did not allow Sutton to present evidence supporting these defenses at the declaratory relief hearing. Sutton sought to call as a witness Paul Axness, a Mutual of Enumclaw Insurance adjuster who handled claims against Piercy in 2001 relating to an accident between some of Piercy's cattle and another car. Mr. Axness's phone notes documented conversations with Piercy which indicated that Mr. Axness was told by Piercy that his land was located within a herd district. Judge Petrie did not accept an offer of proof from counsel for Guzman on the issue. While Judge Petrie gave his reasons for not taking evidence, there was no motion pending by Piercy on the defenses. Judge Petrie believed that he had already dismissed these defenses in the course of considering Piercy's motion for summary judgment filed in 2007.

A review of the record, however, indicates that Piercy never moved to dismiss these defenses, and that Judge Petrie did not follow the proper procedural steps to dismiss the defenses *sua sponte*.

Sutton raised the estoppel by waiver and quasi estoppel defenses in response to Piercy's motion for summary judgment. (See Defendant Jennifer Sutton's Opposition to Defendant Dale Piercy's Motion for Summary Judgment, filed July 24, 2007.) Sutton did not file a cross-motion for summary judgment. In late August, 2007, Piercy filed his Reply to Plaintiffs' and Co-Defendant's Responding Memorandums and Motion to Strike Co-Defendant's Supplemental Brief, but did not request summary judgment on the affirmative defenses of estoppel by waiver and quasi-estoppel.

In its written decision on Piercy's motion for summary judgment, Judge Petrie did not analyze the estoppel by waiver or quasi estoppel defenses. (See Order Denying Defendant

REPLY BRIEF IN SUPPORT OF DEFENDANT SUTTON'S
MOTION FOR RECONSIDERATION – 4

Piercy's Motion for Summary Judgment, Joining Canyon County, and Holding All Other Motions in Abeyance until the Herd District's Validity is Resolved, dated October 9, 2007.) Plaintiff Guzman then filed a motion for reconsideration so that the Court could address these defenses. (*See* Plaintiff's Motion for Reconsideration, dated March 27, 2008.)

The Court issued its Order on Motion to Reconsider on April 30, 2008. Importantly, the Court noted "that *based upon the record presented thus far*, neither quasi estoppel or laches apply in this matter." (Order on Motion to Reconsider, p. 1 (emphasis added).) At the end of the decision the Court noted it "denies the assertion of the doctrine of quasi estoppel and the doctrine of laches against Defendant Piercy's attempt to invalidate Canyon County's Herd District ordinances." (*Id.*, p. 20.)

At the declaratory relief hearing of August 8, 2008, the Court indicated it had dismissed these defenses. (*See* Transcript, p. 162, ll. 1-2.) There was, however, no motion ever pending that requested dismissal of these defenses, and the Court's April 30, 2008 Order on Motion to Reconsider was only based upon the record presented thus far, implying that the Court would consider additional evidence if presented. (While it is clear, in reviewing the transcript from the declaratory relief action, that the Court did not intend to consider additional evidence, the order on the motion for reconsideration nevertheless gave that impression, hence Sutton's decision to call Paul Axness as a witness in the declaratory relief hearing.)

While Sutton certainly understands that this Court's decision may be the same as Judge Petrie's regarding these defenses, Sutton requests merely the opportunity to present additional evidence supporting these defenses so that the record can be complete for any potential appeal.

REPLY BRIEF IN SUPPORT OF DEFENDANT SUTTON'S
MOTION FOR RECONSIDERATION – 5

3. The Court Should Analyze the Statute of Limitations Defense

The problem with Judge Petrie's decision following the declaratory relief hearing is that it did not analyze the statute of limitations defense raised by Sutton and Guzman. The decision is silent on the defense. We do not know if Judge Petrie thought the defense was waived, or had no merit, or if he even considered it. This issue is as much about process as it is about anything, as if the declaratory relief decision is appealed then it will be imperative for Sutton and Guzman to understand the Court's reasoning for either accepting or rejecting this particular defense. (It will also, assumably, be important for the Idaho Supreme Court to understand the Court's decision.)

The stipulation between the parties providing that "Canyon County, Mr. Guzman and Ms. Sutton waive any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief" was not intended to waive affirmative defenses based on the statute of limitations. The purpose of that language was limited to the context of what the stipulation sought to accomplish, which was to permit the filing of an amended action for declaratory relief late in the case, and avoid the time limitations found in IRCP 15(a) for amendments to pleadings. Counsel for Sutton did not intend to waive the statute of limitations defense by agreeing not to object to the timing of Piercy's filing of an amended declaratory relief action. It is impossible for that to have been the purpose of this language in the stipulation, since at no time before that date had the parties discussed the statute of limitations defense because of the procedural posture of the case, i.e., the parties were misaligned after Judge Petrie ordered Sutton, rather than Piercy, to file a declaratory relief action, when it was Piercy that was challenging the 1982 herd district, not Sutton. *There was no opportunity, until Piercy filed his*

amended declaratory relief action in September, 2008, to assert this affirmative defense, since the district court put Sutton in the position of the plaintiff in the declaratory relief action.

Sutton merely asks for this Court's decision on the statute of limitations defense, because presently, should this case proceed on appeal, the Idaho Supreme Court is not going to know why Judge Petrie did not address the defense or what he thought of the defense. This case is now this Court's. Accordingly, Sutton asks the Court to analyze this issue.

4. Sanctions

Piercy's request for sanctions fails for a number of reasons. First, the request does not set forth a rule or case under which sanctions would be appropriate. This motion does not meet the particularity requirement of IRCP 7(b)(1). Second, and relating to the first, it is impossible for Sutton to respond because she does not know under which rule Piercy requests sanctions. Third, there is no dispute that the accident in this case did not happen in the 1982 herd district Judge Petrie struck down, but happened instead in the 1908 herd district, which is still valid. The judgment as written erroneously states that the accident happened in the 1982 herd district. It must be corrected and the case analyzed in light of where the accident actually occurred. Fourth, there is no dispute that Piercy never moved to dismiss the affirmative defenses on which Judge Petrie refused to take evidence at the declaratory relief action. Sutton merely asks to submit the evidence she wished to submit at the declaratory relief proceeding.

Sutton's arguments are all in good faith and taken largely with an eye on the appeal that is likely to occur in this case. The record should be complete, as should the Court's analysis on

each applicable defense raised by the parties so that the Idaho Supreme Court can decide the basis of this Court's decisions.

DATED this 11th day of August, 2009.

ELAM & BURKE, P.A.

By: Joshua S. Evett
Joshua S. Evett, of the firm
Attorneys for Defendant Jennifer Sutton

REPLY BRIEF IN SUPPORT OF DEFENDANT SUTTON'S
MOTION FOR RECONSIDERATION – 8

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August, 2009, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

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Ryan B. Peck
Saetrum Law Offices
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John T. Bujak
Carlton R. Ericson
Canyon County Deputy Prosecutor
Canyon County Courthouse
1115 Albany
Caldwell, ID 83605

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☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile



Joshua S. Evett

REPLY BRIEF IN SUPPORT OF DEFENDANT SUTTON'S
MOTION FOR RECONSIDERATION - 9

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Dir

F I L E D
A.M. 1:40 P.M.
DEC 07 2009
CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

LUIS J. GUZMAN, individually,

Plaintiff,

vs.

**DALE PIERCY, individually, and
JENNIFER SUTTON, individually
Defendants.**

DALE PIERCY, individually,

Plaintiff,

vs.

**CANYON COUNTY, LUIS GUZMAN,
individually and JENNIFER SUTTON,
individually**

Defendants.

Case No. CV – 2005-4848-C

**ORDER ON MOTION TO
RECONSIDER**

This is a civil action. On October 13, 2009, the court heard oral argument on Jennifer Sutton and Luis Guzman's Motions for Reconsideration. Sutton was represented by Josh Evett. Also present and presenting arguments were Timothy Walton for Luis Guzman, Ryan Peck for Dale Piercy and Carlton Ericson for Canyon County.

Facts and Procedure

The following is a summary of the procedural history of this case relevant to Sutton's pending motion to reconsider. This action was initiated by Complaint filed May 5, 2005. An Amended Complaint was filed on May 19, 2005 and a Second Amended Complaint was filed on August 30, 2005. This case was originally assigned to the Honorable James C. Morfitt.

On February 2, 2007, this case was reassigned to the Honorable Gordon W. Petrie as part of a redistribution of the existing caseloads of the other district judges in the Third Judicial District to the new district court position.

On May 2, 2007, Piercy filed a Motion for Summary Judgment with supporting affidavits. The parties filed responsive pleadings with supporting documents and presented oral arguments on September 6, 2007. On October 9, 2007, Judge Petrie entered an Order Denying Defendant Percy's (sic) Motion for Summary Judgment, Joining Canyon County, and Holding all Other Motions in Abeyance Until the Herd District's Validity is Resolved.

In response to Judge Petrie's October 9, 2007 Order, Sutton filed an Action for Declaratory Judgment on October 15, 2007. Canyon County responded by filing its Answer on November 8, 2007.

Rivera and Guzman responded to Judge Petrie's October 9, 2007 Order by filing a Plaintiffs' Motion to Reconsider on November 8, 2007. In their Motion to Reconsider, Rivera and Guzman asked the court to reconsider its order allowing Piercy to challenge the validity of Canyon County's 1982 herd district ordinance and specifically requested the court to consider whether the doctrines of estoppel and estoppel by laches precluded

Piercy from challenging the validity of the 1982 herd district ordinance. Sutton filed a Response and Joinder in Plaintiffs' Motion to Reconsider on November 27, 2007. Piercy filed an Objection to Plaintiffs' Motion to Reconsider on December 3, 2007.

Judge Petrie issued an Order on Motion to Reconsider on April 30, 2008.¹ The Order was issued without further oral argument on the matter, although all parties had submitted written argument on the issue prior to the entry of Judge Petrie's decision. In his Order on Motion to Reconsider, Judge Petrie analyzed the doctrines of quasi-estoppel and estoppel by laches and ruled that neither theory was applicable to this action, denied the motion for reconsideration, and affirmed his belief that it was time for Canyon County to "become decisively engaged in this litigation" by participating in a bifurcated "mini trial" regarding the validity of the 1982 herd district.

On June 25, 2008, Piercy filed a Complaint for Declaratory Relief which essentially re-aligned the parties to properly reflect the party asserting the challenge to Canyon County's herd district. The parties filed a Stipulation to Amend Pleadings and Scheduling on September 4, 2008 and Piercy filed an Amended Action for Declaratory Relief on September 11, 2008. Guzman's Answer filed September 19, 2008 asserted the affirmative defenses of estoppel by laches, equitable estoppel, and statute of limitations. Sutton's Answer filed September 23, 2008 asserted the affirmative defenses of estoppel by laches, estoppel by waiver and/or equitable estoppel, as well as a statute of limitations defense. Canyon County filed its Answer on September 24, 2008 which included an assertion of an affirmative defense based on the presumption of the validity of a herd

¹ The motion had been scheduled for oral argument on December 6, 2007 but was vacated. In February 2008, the court was instructed that settlement was reached between Plaintiff Erika Rivera and the Defendants but that Plaintiff Guzman was continuing to pursue his claims. As discovery continued between Canyon County and the various parties, Guzman then renewed the Motion to Reconsider.

district as set forth in Idaho Code § 31-857.

On October 8, 2008 Judge Petrie heard the bifurcated bench trial also referred to as a “mini-trial” regarding the validity of the 1982 herd district. A review of pages 161-167 of the transcript of that hearing reflects that Mr. Evett and Mr. Walton attempted to introduce evidence from an insurance adjustor related to their asserted affirmative defenses of estoppel and laches. Judge Petrie declined the parties’ request to present this evidence during the “mini-trial.” The parties submitted written closing arguments and post-trial briefs following the “mini-trial”. Sutton’s closing brief included argument on the statute of limitation affirmative defense.

On January 21, 2009, the Judge Petrie issued his Findings of Fact, Conclusions of Law and Judgment in Bifurcated Portion of Trial. In this order, Judge Petrie concluded that the 1982 Canyon County herd district was invalid and void. On page 13 of the Order, Judge Petrie specifically ordered that “2. Neither Plaintiff Luiz Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy’s bull in Canyon County in 2005.”

Canyon County, Sutton, and Guzman all filed a Notice of Appeal to the Idaho Supreme Court following the entry of the court’s order. That appeal was eventually dismissed by the Idaho Supreme Court because Judge Petrie’s order was not a final order or judgment and not subject to appeal absent an IRCP 54(b) certification. Judge Petrie retired and in April of 2009, this court was assigned the responsibility of presiding over this matter.

Piercy filed a Second Motion for Summary Judgment on May 5, 2009 and on July

30, 2009 Sutton filed the Motion for Reconsideration which is the subject of this order. Erica Lynn Rivera's claims have been resolved and she is no longer a party to this action. The remaining Plaintiff, Luis J. Guzman filed a Motion for Reconsideration on August 11, 2009. Oral argument on the pending Motions for Reconsideration was presented to the court October 13, 2009. Oral argument on the Motion for Summary Judgment has been delayed pending the outcome of this court's decision on the Motions for Reconsideration.

Motion for Reconsideration

1. The stipulated correction to the January 21, 2009 Order

The first issue the court will address on the pending motion for reconsideration is Sutton's request that this court correct an alleged factual error set forth in Judge Petrie's January 21, 2009 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN BIFURCATED PORTION OF TRIAL. Specifically, Sutton argues that the following language set forth on page 13 of the Order is factually incorrect: "2. Neither Plaintiff Luiz Guzman nor Defendant Jennifer Sutton may rely upon the existence of a herd district at the location of their involvement in a collision with Defendant Dale Piercy's bull in Canyon County in 2005."

There are two distinct herd districts relevant to the location of the accident that is the basis of this action. The first herd district was created in 1908. The second herd district was purportedly created in 1982. The parties stipulated during their oral argument before this court that the collision that is the basis of this lawsuit actually occurred within the geographic confines of the unchallenged 1908 Canyon County herd district while the bull that was struck had escaped from a parcel of Piercy's real property

located within the geographic confines of the 1982 herd district declared invalid by Judge Petrie's January 21, 2009 Order.

The validity of the 1908 herd district was never at issue during the "mini trial" and therefore the validity of the herd district applicable to the precise location of the collision was not an issue considered by Judge Petrie. The paragraph designated as number two located on page thirteen of Judge Petrie's January 21, 2009 Order is factually inaccurate and to the extent it reflects a legal conclusion it is also inaccurate. The motion to reconsider that portion of the January 21, 2009 order is granted.

Judge Petrie's January 21, 2009 order is amended to reflect that the actual collision between the motor vehicle and the bull occurred within the geographic confines of the 1908 herd district which has not been challenged or declared invalid in this action and that the bull that was struck escaped from a parcel of Piercy's land located within the confines of the challenged 1982 herd district. The validity of the 1982 Canyon County herd district is subject to this court's further consideration as more particularly described below.

2. Statute of Limitations Issue

In her Motion for Reconsideration, Sutton argues that Piercy's attack on the validity of the 1982 herd district should be barred by the statute of limitations found in Idaho Code 5-224. Sutton's motion provides a detailed argument as to the applicable law and the facts of this case, however, at oral argument the issue presented to the court was whether or not Sutton should be allowed to raise the statute of limitations issue and have it decided by this court prior to completion of the case.

Piercy argues that Sutton and Guzman specifically waived any statute of

limitations defense in the stipulation signed by the parties on September 4, 2008 and that Canyon County, the proper party to assert such a defense, did not raise that defense. Sutton and Guzman disagree with the representation that they waived the right to assert this defense.

After careful review of the record in this case, including the January 21, 2009 Order, this court finds that the statute of limitations argument has not been fully considered and decided by the court. This court is concerned with the need to establish and preserve a complete record on the issues presented in this case for appellate purposes. The court is also concerned with its ability to properly decide the issue with the information currently before it due to the disagreement between the parties as to the intent of the stipulation and the right of the parties to assert this defense.

The court will allow the parties to submit argument on the issue of the parties' right to assert the statute of limitations defense, as well as to submit argument on whether the statute of limitations asserted should be applied to this action. The court is aware that this will further extend the length of this case and delay final determination of Guzman's claims but feels it is necessary in order to protect the rights of all the parties to this litigation and to further ensure that all issues have been carefully and thoughtfully addressed by the trial court before the matter is subjected to appellate court review.

3. Estoppel Issues

As with the statute of limitations issue described above, Sutton's motion on the estoppel issues addresses the applicable legal authority and facts of the case, however, the parties limited their discussion to whether or not this issue should be given one last shot at consideration in light of factual evidence that was not allowed to be presented during

the October 8, 2008 “mini-trial”.

This court has carefully considered the procedural history of this issue in this case and Judge Petrie’s prior decisions, including his decision to exclude evidence on this issue offered by Sutton during the October 8, 2008 “mini-trial.” The court has also reviewed the legal authority and in light of the representations of counsel of the evidence that was being offered during the “mini trial” on the estoppel issue, this court finds that it is in the interest of justice and the parties to this action for this court to consider the proffered evidence and make a final determination of the applicability of the estoppel doctrine to Piercy’s assertion that the 1982 herd district is invalid.

This court is again mindful of the delay this order may cause to the final determination of the issues in this case, but is equally mindful of its responsibility to carefully and fully consider and resolve all issues that need to be addressed before the appellate courts are asked to do the same.

Conclusion and Order

Sutton and Guzman’s Motion to Reconsider is granted as follows:

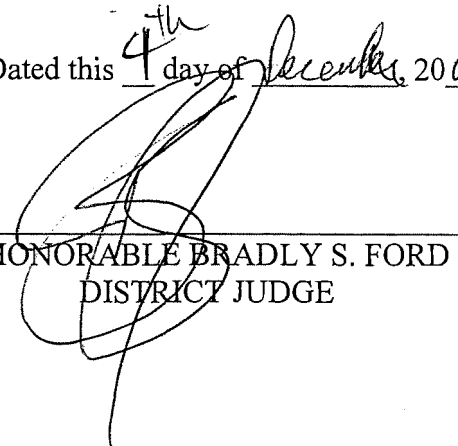
1. The record of this court is corrected to reflect that the collision that is the basis of this lawsuit actually occurred within the geographic confines of the unchallenged 1908 Canyon County herd district while the bull that was struck had escaped from a parcel of Piercy’s real property located within the geographic confines of the 1982 herd district declared invalid by Judge Petrie’s January 21, 2009 Order.

2. Sutton will be allowed to present evidence from the insurance adjuster in support of her argument that the estoppel doctrine should be considered by the court in determining Piercy’s assertion that the 1982 herd district is not valid. The court is not

aware of any other evidence being offered by the parties on this issue. The parties are ordered to contact the court's secretary within ten days of this order to schedule a hearing for the presentation of the evidence from the insurance adjuster or the parties can agree to submit the evidence in the form of a stipulated affidavit or offer of proof in lieu of a court hearing.

3. The parties shall contact the court's secretary within ten days of this order to schedule a date certain for oral arguments on the validity of the 1982 Canyon County herd district in light of the asserted statute of limitations and estoppel defenses. The court encourages the parties to stipulate to a scheduling order for any additional briefing on those issues. If the parties cannot stipulate to a briefing schedule, they are to schedule a telephone conference with the court for its direction on a briefing schedule. The court asks the parties to reiterate procedural histories, claims, arguments, and legal authority on the matters at issue in the briefing due to the extensive history of this case (sixteen volumes) that preceded its assignment to this court.

Dated this 4th day of December, 2009


HONORABLE BRADLY S. FORD
DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that on 2 day of December, 2009, s/he served a true and correct copy of the original of the foregoing ORDER ON MOTION TO RECONSIDER on the following individuals in the manner described:

- upon counsel for plaintiff:

Timothy Walton
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P.O.Box 1069
Boise, Idaho 83701

Stephen E. Blackburn
Attorney at Law
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- upon counsel for defendant (Jennifer Sutton):

Joshua S. Evett
Attorney at Law
P.O. Box 1539
Boise, Idaho 83701

- and upon counsel for defendant(Dale W. Piercy):

Rodney R. Saetrum
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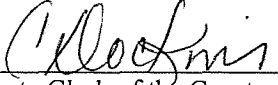
- and upon counsel for counsel for defendant (Canyon County):

John T. Bujak
Attorney at Law
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605

and/or when s/he deposited each a copy of the foregoing ORDER in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

WILLIAM H. HURST, Clerk of the Court

By: _____


Deputy Clerk of the Court

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Attorneys for Plaintiff Luis J. Guzman

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LUIS J. GUZMAN,

Plaintiff,

vs.

DALE W. PIERCY, individually and
JENNIFER SUTTON individually,

Defendants.

DALE PIERCY, individually,

Plaintiff,

vs.

CANYON COUNTY, LUIS GUZMAN,
Individually and JENNIFER SUTTON,
Individually,

Defendants.

Case No: CV05-4848

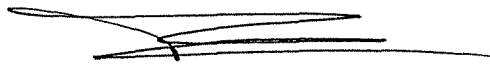
**PLAINTIFF/DEFENDANT, LUIS
J. GUZMAN'S MOTIONS FOR
RECONSIDERATION AND
MOTION TO DISMISS**

COMES NOW the above-captioned plaintiff/defendant Guzman and hereby moves this court to dismiss defendant Piercy's Eighth defense contained in his Answer to Plaintiff's Third Amended Complaint which defense alleges that Dale Piercy is entitled to the protection of Idaho's open range statutes, and the immunities provided therein. Plaintiff also requests that the court reverse Judge Petrie's ruling in this case, entered January 21, 2008, finding that the 1982 herd district (which herd district includes the lands where defendant Piercy's bull was pastured) was invalid.

This motion is based upon Guzman's Memorandum In Support of Guzman's Motions for Reconsideration and Motion to Dismiss, including the legislative amendment effective July 1, 2009, to Idaho Code Section 31-857.

DATED this 25th day of May, 2010.

Chasan & Walton, LLC



Timothy C. Walton, Attorney for
Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 25th day of May, 2010, a true and correct copy
of the above and foregoing document was served upon by:

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